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No. 95-6510

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In The

Supreme Court of the United States

October Term, 1995

COLEMAN WAYNE GRAY,

Petitioner,

vs.

J.D. NETHERLAND, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX
Volume I, Pages 1-179

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RELEVANT DOCKET EVENTS

December 2, 1985:	Guilt phase of trial.
December 6, 1985:	Sentencing phase of trial. Petitioner sentenced to death.
January 13, 1987:	Brief of Appellee filed in the Supreme Court of Virginia.
April 24, 1987:	Convictions and death sentence affirmed by the Supreme Court of Virginia, Gray v. Commonwealth.
July 7, 1988:	Petition for writ of habeas corpus filed in the Circuit Court for the City of Suffolk, Virginia.
August 22, 1989:	Hearing on respondent's motion to dismiss petition for writ of habeas corpus.
May 23, 1990:	Petition for writ of habeas corpus denied by order of the Circuit Court of the City of Suffolk, Virginia.
August 14, 1990:	Petition for Appeal from denial of state habeas petition filed in the Supreme Court of Virginia.
January 11, 1991:	Petition for Appeal denied by order of the Supreme Court of Virginia.

In the Circuit Court for the City of Suffolk, Virginia

Coleman Wayne Gray

v.

Commonwealth

Q Tell the jury if you would, in your own words, what this letter from Mr. Ferguson to your lawyer, Andrew Sacks, means to you. What does this mean to you, without trying to explain in details?

MR. FERGUSON: Your Honor, I think the letter is self-explanatory. The letter says exactly what it says. It's very clear. I think the jury itself can read the letter. I have even read the letter to the jury, and it says exactly what it says.

THE COURT: He can tell what he thinks it says. He can tell what he thinks it means. Go ahead.

MR. FERGUSON: All right, sir.

MR. MOORE, Continuing-

Q Okay.

A It means no more to me than what it says.

Q What does it say?

A It says, indicates to me that they want me to tell the truth about the situation. That's the way I take it.

Q And in exchange for you telling the truth what else does it mean to you?

A Well, regardless of what the exchange is to me, if it came down to it this is what was going to be said anyway.

Q What does it mean as far as possible punishment?

A I know what the punishment is. The letter don't have to tell me that.

Q You mean you don't know that in exchange for your testimony here today you will not be electrocuted?

A I wasn't planning on being electrocuted for to start with.

MR. FERGUSON: The letter is clear. The man will be tried on a first degree murder char , [sic] which does not carry a death penalty offense.

MR. MOORE: Your Honor, I have asked him that question. He said he doesn't even know it. I think I can explore that.

MR. FERGUSON: I assume Mr. Tucker is not a lawyer.

MR. MOORE: Well, I'll ask it again.

THE COURT: He's on cross examination. It's his agreement. He can explain what he thinks it means.

MR. MOORE: All right

MR. MOORE, Continuing-

Q It means one thing to you. It means that you are going to come forward and tell the truth today; is that right?

A Yes, sir.

Q Now, you have made other statements to police officers, haven't you, on prior occasions; is that correct?

A Yes, sir.

Q That's not the same thing, what you're telling today, as what you have told the police in the past; is it?

A No, sir.

Q So today you're going to come forward and tell the truth; right?

A Yes, sir. The first time I talked to the police I didn't indicate myself like it really was.

Q Well, okay. So you haven't told the truth in the past to the police about this, but today you're going to do so. In exchange for the truth today, what does it mean you're going to get in return? Do you understand this to mean there is a guarantee that you will not be prosecuted for capital murder? you understand that?

A Yes, sir. For capital murder?

Q Yes, sir.

A Yes, sir.

Q And what does capital murder mean as the difference between first degree murder? What's the difference between those two things?

A Capital murder carries the electric chair and murder doesn't.

Q And you are not going to be charged with capital murder; are you? You have got that promise from this man, don't you?

A I suspect so.

Q In exchange for your testimony today; right?

A Yes, sir.

Q What is your understanding as discussed by Mr. Ferguson and your lawyer as to the maximum punishment that you can get for your testifying and your participation in this trial?

A Any number of years.

Q A number of years?

A Any number of years.

Q Not even a life term?

A That's if I plead guilty. If I plead not guilty –

Q If you plead –

A – If I plead guilty I cannot get life.

Q If you plead guilty you cannot even get a life term for your participation in this crime?

A Yes, sir.

Q What happens if you plead not guilty and elect a trial? What is the maximum punishment you can get for your participation in this crime?

A Any number of years.

Q A number of years?

A Yes, sir.

Q So to sum it up, if you would – What does this really mean to you right now, in relation to your family and five children? It means you get to live; doesn't it?

MRS. TUCKER: I don't think my children should be brought up in a courtroom.

THE COURT: All right.

MR. MOORE: I ask that she be removed from the courtroom.

THE COURT: Any further outbursts and you will be removed from the courtroom. All right, go ahead.

MR. MOORE, Continuing-

Q You testified earlier that you had been charged or convicted of a felony; is that correct?

A Yes, sir.

Q I think you said it was what?

A Armed robbery.

Q Robbery with the use of a firearm; is that correct?

A Yes, sir.

Q Mr. Tucker how far is your place of work, where you work, from where this man was killed? How far?

A Not far.

Q How far?

A I don't know. I never walked it off, measured it.

Q Few hundred feet? Hundred yards?

A Maybe.

Q Not even a mile; is it?

A No, it's not a mile.

Q You said you made statements to the police officers before, but that wasn't the truth; was it?

A That's what I said.

Q You said it was not the truth? Speak up so the jury can hear you.

A Yes, sir.

Q It was not the truth when you talked to the police officers before; right?

A Most of it was.

Q Most of it was?

A Yes, sir.

Q Let's see what was not the truth, "Little Man". The first statement, do you remember giving a statement to the police with Carl Lilley, Sergeant Carl Lilley present on May 22, 1985? Do you remember that statement?

A I gave him a statement. I don't recall the date.

Q Remember making that? You made your initial statement at 1:40 in the morning; is that right?

A I made a statement. I don't know what time it was.

Q To Sergeant Lilley, 1:40 in the morning approximately, the best you can remember?

A I made a statement to Sergeant Lilley.

MR. FERGUSON: Your Honor, I would ask if Mr. Moore can either question the witness back here. I can't see him. I can't hear him. I can't do anything when he's standing right in front of the witness.

MR. MOORE: I'll stand where Mr. Ferguson can hear me. Your Honor.

MR. FERGUSON: That's fine.

MR. MOORE, Continuing-

Q Do you remember making a statement at 7 o'clock in the morning on May 22, the same time you made one earlier in the morning? Did you make one at 7 o'clock in the morning?

A I guess it was. I made one in the morning.

Q Did you make another statement 2 o'clock in the afternoon the same day?

A I made several statements. I don't recall what day or what time I made the statement.

Q Did you tell the truth in any of those three statements?

A Yes. I told most of the truth in all the statements.

Q But you told most of the truth. In fact, as the statement went on isn't it true that you told a little bit more of the truth every time you talked?

A I don't remember what was said in each statement.

Q Okay. We're going to go through that a little bit, sir. Let's see what you testified to today. You said that you had known Mr. Gray for a couple of months you testified; is that correct?

A Several months.

Q Several months before the commission of this crime?

A Yes, sir.

Q How many months?

A I don't know how many.

Q One, two, three, four, fifteen, or twenty? How many? A guess?

A I don't know how many months. I know'd him several months.

Q Did you know him at Christmas time?

A No, sir.

Q Didn't know him at Christmas time. And so you were over there while they were making these plans. Now, you say you really didn't know what was going on at that time; right?

A The sketching of the store was drawed out before I came out.

Q The sketch?

A The store had been discussed before I came over.

Q And when you came over why do you think they told you?

A I don't know why they told me.

Q Oh. Didn't they ask you to participate in the crime?

A Yes, I suspect so.

Q And you agreed at that time to participate in the crime; didn't you?

A Maybe I did.

Q And in exchange for your participation you were to receive one half of the –

A No, sir.

Q – take?

A No, sir.

Q And further, the next thing that you were over with Coleman at somebody's house getting high on a free base bowl; was that your testimony?

A Yes, sir.

Q Were you getting high on a free base bowl?

A Yes, sir.

Q How high were you?

A About as high as cocaine can get you.

Q You were pretty smoked, weren't you?

A No, sir.

Q Well, how many hits had you had or how much had you had?

A I don't know.

Q Was Coleman high on it as well?

A Everybody smoked out of it was high I suspect.

Q What kind of affect did it have on you that night? Were you thinking clearly or what?

A Yes, sir.

Q I have never used cocaine myself, but is your recollection clear after your use of cocaine.

A I suppose to. I guess so.

Q Well, is it or is it not clear after you use cocaine?

A I don't know. Maybe it have a differ affect on some people.

Q What kind of affect does it have on you?

A Just a speeding high to me.

Q Speed high? Next day you remember everything perfectly; is that right?

A Yes, sir.

Q How often do you get high on cocaine?

A I get high off cocaine a lot.

Q As much as you can; can't you?

A Not as much as I can.

Q In fact, you've been getting high since you've been in jail; haven't you?

A No, sir.

Q Haven't you been charged with an offense of –

MR. FERGUSON: Your Honor, I am going to object. I don't see any relevancy to this at all. The man's admitted he used cocaine, he has admitted to a lot of things. That's got nothing to do with trying this case. I think that what's relevant in this case is what he did on this occasion and during this period of time.

MR. MOORE: Your Honor, our position is the credibility of this man can put him in the electric chair and take him out. I'm entitled to know the extent and use of a drug as serious as cocaine. I think I should be able to explore as fully as possible and the jury should know exactly how serious a drug addict this man is. And the fact that he was smoking it in jail is certainly one of them.

THE COURT: Well, the fact he's a user is one thing, Mr. Moore. I assume that there has been no conviction of that?

MR. MOORE: No, sir. I could ask him if he has been charged with that or if he actually did it.

THE COURT: Well, I don't think we can go into the, into the charge or into the – if there has been no conviction.

MR. MOORE: May I ask him if he's used drugs while he's been in jail?

THE COURT: Sure.

MR. MOORE, Continuing-

Q Have you got high on cocaine or any drugs since you have been incarcerated?

A I haven't got high on cocaine.

Q Have you gotten high on other drugs since you have been incarcerated?

A Yes, sir.

Q Are you high today?

A No, sir.

So you were high that night and you ended up at Murphy's Mart which, as I understand your testimony, was no idea of yours at all, right? It was Coleman Gray's idea to pull in there and you pulled into Murphy's Mart with him?

A I didn't say it was anybody idea.

* * *

In the Circuit Court for the City of Suffolk, Virginia

[Caption Omitted In Printing]

Testimony of Ronald H. Whitte

[746] MR. RONALD H. WHITTE, having been first duly sworn was called as a witness on behalf of the Commonwealth and testified as follows:

DIRECT EXAMINATION

BY MR. FERGUSON:

Q Would you state your name for the Court and members of the jury, please?

A Ronald H. Whitte.

Q And Mr. Whitte, where do you live?

A Portsmouth, Virginia.

Q And where are you employed?

A Smithfield Foods.

Q And what is your position with them?

[747] A I'm an engineer.

Q Are you married?

A No, I'm not.

Q All right. Mr. Whitte, I want to take your attention back to 1977, back in June, the first part of July, 1977. Did you have occasion to come into contact with the defendant, Coleman Wayne Gray?

A Yes, sir; I did.

Q What were the circumstances under which you came into contact with him?

A Coleman Gray –

Q Speak up a little bit so all the jurors can hear.

A Coleman Gray attempted a robbery and I was wounded in the process.

Q All right. Tell us, if you would, factually the details of what you were doing and exactly what occurred?

A It happened July, '77. I remember that because my boy was born that year.

Q Your what?

A My baby boy was born then.

Q I see.

A I came home from work and my wife and I at the time wanted to go for a bike ride. So, we put our children on the back of the bikes.

Q How many children did you have [748] that you put on?

A I have a little girl who was almost three at the time and a boy that was six months old.

Q All right.

A There was a housing development. Well, there were two housing developments, and in between those two housing developments was a wooded area. And it was a bike path. There were two bike paths, one about 18,

24 inches higher than the other path with some shrubbery in between and a few trees.

We had gone through the one housing development and had entered the woods when two black men, one of which was Coleman Gray, asked which way Churchland was.

Well, without stopping the bike – I thought he meant the shopping center, and we kept riding on the lower path. He was on the higher path.

Q Was he on foot or on a bike?

A Sir?

Q Was he on foot or on a bike?

A He was on foot.

Q All right.

A I told him to keep going straight out of the woods, he'll come to the shopping center. The next thing I know is he's running along side of me on the upper path, a gun pointed at me, saying, "Stop, or I'll blow your M.F.-ing head off."

Q Say the words, exactly what he [749] said.

A Mother fucking head off. Of course, at that time I was frightened. I got off the bike. I was afraid for my family. I walked away from them, further down the path to get away from them. And at that point Gray pointed the gun at me, saying, "Give me your money." I told him, "No." He shot me in the arm.

At that point my fear turned to anger and I went after him. I chased him. He fired several more rounds,

one of which hit me in the foot. At that point I couldn't catch him. I went back to the bike.

The other black man was standing, as I was looking at Gray in front of me, the other man was on the lower trail behind my wife and the babies on the bike. Again, I could not identify him. My concentration was on Gray. I went back to the bike, were leaving the bikes or leaving the woods. Just before we get out of the woods – and I guess this is the part that really gets to me – he fires another shot that goes past us through the trees, and that's the one that could have hit one of my babies. And shooting at me is one thing, but when he took a shot and could have hit one of those kids, that really got to me.

We got out of the woods, and shortly after that Coleman Gray was found guilty of I guess assault and attempted robbery.

Q You were actually struck in two [750] locations?

A Yes, sir.

Q And they were what part of your body?

A My forearm and my left foot.

Q All right. How many shots in all were fired at you or in your direction?

A My wife said she heard –

Q How many did you hear? I would rather – Don't go into what your wife said.

A It was several. The one, you know, I didn't even hear the one that hit me. That was just an impulse. Three that I recall. The third one, of course, hit my foot.

Q How close did that last bullet come to striking you or some member of your family?

A Well, that's – I could still hear that bullet going through the trees. How close do you have to be? Pretty darned close.

Q All right. Now, when you refer to Coleman Wayne Gray, the person that committed these acts, do you see that man in the courtroom?

A Yes, sir; I do.

Q Would you identify him for the members of the jury?

A The man in the black suit.

Q The defendant in this case?

A Yes, sir.

A Yes, sir.

Testimony of Melvin Tucker

[770] MELVIN G. TUCKER, having been first duly sworn, was called as a witness on behalf of the Commonwealth and testified as follows:

DIRECT EXAMINATION

BY MR. FERGUSON:

Q Would you state your name for the Court, please, and when you do speak up so all [771] the members of the jury can hear you. It's difficult to hear in here.

A Melvin Tucker.

Q And Mr. Tucker, you have previously testified in this case; is that correct?

A Yes, sir.

Q And you realize you're still under oath in these proceedings?

A Yes, sir.

Q All right. And I previously questioned you regarding your prior criminal record and we have gone into all the details of the plea agreement, or the agreement that was entered into between your attorney, yourself, and the Commonwealth Attorney's Office; is that correct?

A Yes, sir.

Q So, all of the things you earlier testified to regarding those things are still in force and effect; is that correct?

A Yes, sir.

Q All right. Now Mr. Tucker, I want to take your attention back to sometime prior to this incident and ask if you had occasion to be in the company of the defendant, Coleman Wayne Gray, as it related to some other criminal offenses? Conversations you had?

A Yes, sir.

Q All right. What was the first [772] offense that you talked with him about?

A Well, one night I was over – I was laying down asleep and he came over to the house and knocked on the door. My wife answered the door, and she came to woke me up, and I talked with him. He told me that he had took the Circle Restaurant off.

Q Speak up loud so the members of the jury – He did what?

A He came over and told me that he had took the Circle Restaurant off.

Q Took it off?

A Yes, sir.

Q All right. What happened after that? What did he say after he told you that? What did you do?

A He asked me come over to his apartment. I got up and went over to his apartment, and he had the money on the table.

Q How much money did he have?

A I was about a thousand dollars.

Q And when you saw that what conversation did you then have with him?

A He told me what he had did with the people.

Q What did he tell you he had done with the people?

A Locked them in the freezer.

Q And, what did he – What did you say [773] when he told you he had locked them in the freezer?

A I asked him was it cold in the freezer. He said yeah. I told him I was going to call the police, let them out.

Q Did you call the police?

A Yes.

Q Did you leave your name or called anonymously?

A Called anonymously.

Q All right. Now, subsequent to that particular incident did you have occasion to be in his presence regarding another criminal offense?

A Yes, sir.

Q Or statement regarding –

A Yes, sir.

Q When did that occur?

A As we were coming up toward Bellville Meadows it was a girl out there that we had heard –

Q Slow down and speak up so all the members of the jury can hear you.

A It was a girl standing outside of Bellville Apartments that we had heard that was running her mouth about the Murphy's Mart case.

Q When was that that this occurred? I mean, that you heard about it and you were with Melvin, I mean with Coleman Gray?

A This was after the Murphy's Mart [774] robbery.

Q How many days after the Murphy's Mart –

A It was inside a week; something like that.

Q Sometime between the date of the offense and when Coleman was arrested?

A Yes, sir.

Q All right. Now, where were you when you were discussing about – Or tell us what happened. Excuse me. Go ahead.

A We came up and she didn't speak, or something, and we had heard that she had been saying something about the case. And he said she keep on running her mouth he going to fuck her up.

And we got out the car and went up to his apartment. We were searching through the newspaper for some information on the Murphy's Mart and when he got through the paper, when he got through the paper he told me – that's when he was talking about the girl he told me he had knocked off outside.

Q All right. Did he tell you he had knocked off some other girl outside?

A Yes, sir.

Q And the newspaper that he had, did it have any photograph on it?

A Yes, sir.

Q Whose picture was it?

[775] A Sorrell girl.

Q Sorrell girl?

A Yes, sir.

Q Were you familiar or had you heard about that particular murder?

A Yes, sir.

Q What did you do after he pointed to that picture?

A He just went on, find the newspaper he was talking about, about Murphy's Mart.

Q Now, when you say the Sorrell girl, which Sorrell girl was it?

A Lisa Sorrell.

Q Lisa Sorrell?

A Yes, sir.

Q The mother?

A Yes, sir.

MR. FERGUSON: No further questions for this witness.

MR. MOORE: We have no questions at this time, Your Honor.

THE COURT: All right. That's all. Do you need these last two witnesses? Do you need for them to remain?

MR. MOORE: No, sir; I don't think so. They can be released.

THE COURT: Mr. Ferguson, do you need the last two witnesses?

[776] MR. FERGUSON: No, sir. Call Detective Slezak.

MR. MOORE: Your Honor, I have a motion I would like to make out of the presence of the jury, please.

THE COURT: All right. Ladies and gentlemen, step in the jury room, please.

THE MEMBERS OF THE JURY PANEL RETIRED TO THEIR JURY ROOM AND THE FOLLOWING MATTER WAS TAKEN UP OUTSIDE OF THEIR PRESENCE.

MR. MOORE: Your Honor, at this time I would like to renew my motion to have excluded from evidence during this penalty trial any evidence pertaining to any other – any felony for which the defendant has not yet been charged. The basis for this would be that it beyond the scope of what's been testified to. What's been testified to is we have a statement from someone who said the statement was made to him. We don't have any evidence that this man has been charged with the Sorrell murders. We don't have any evidence that he's been indicted by the Sorrell murders. All we have here is a statement made to an inmate. And if the Commonwealth's Attorney wants to introduce hardcore evidence as a result of those

murders to the jury it will do nothing [777] more than inflame the jury and will infer precisely and concisely that this man did the killing, which, in essence, will mean that he will have been tried of the Sorrell murders right in our very presence today.

And as I have argued to the Court earlier in this trial today, we have had no notice of this, short of the last twenty-four hours we have had notice of it. Mr. Eason and I have not had the time to prepare to defend the defendant with another murder charge. He's not been indicted.

We understand that the authority relied upon by the Commonwealth is *Watkins vs. Commonwealth,* a recent decision, but our position is that this scope that the Commonwealth intends to enter at this time, that the scope of the evidence to be adduced by the Commonwealth at this time is beyond the *Watkins* case because the *Watkins* case in which one murder, of a defendant convicted of murder as is to Gray right here, is when the Commonwealth during the penalty trial put on testimony of another murder. It was of another murder, that of which the defendant had already been charged. It was another murder that the defense counsel were actively participating in representing the defendant.

And we ask, Judge, not to allow this evidence. Defense was taken by surprise. And the jump from Mr. Gray's statement to the co-defendant – and that's [778] all we have here, the co-defendant's admission, who we know has made an agreement with the Commonwealth. The Commonwealth wants to get from Melvin Tucker to the photographs of the Sorrells. It's too great a jump, too

broad a jump and only serves to inflame the passion of the jury so that justice in this particular case cannot be rendered. And we ask that the evidence be excluded for that basis.

MR. FERGUSON: Your Honor, on this issue there are a couple of things I'd like to state. First of all, I would state for the record that I advised Mr. Moore prior to yesterday afternoon. They were well aware that the Commonwealth intended to introduce evidence. In fact, I told him before this trial began that the Commonwealth – that if this defendant was found guilty at the sentencing phase we intended to introduce evidence which would show this defendant has confessed to other crimes involving murder, specifically the Sorrell murder.

In addition, Mr. Moore was fully aware of that fact.

The Commonwealth, at this point, has introduced evidence which if believed by this jury would be sufficient, coupled with obviously establishing the corpus delicti, that he could be convicted.

The *Watkins* case is very clear on cases or crimes where a person has not been convicted. [779] The *Watkins* case says, "it is essential that the jury have before it," and it underlines it, "*all possible relevant information* about the individual defendant whose fate it must determine." "We have also held to be admissible in the sentencing phase evidence of other crimes for which a defendant has not been convicted."

It's very clear that the Commonwealth is entitled to introduce this evidence because this evidence goes to the whole thrust of what the Commonwealth must prove in a

sentencing hearing, and that is that this defendant has a proclivity for violence and that he does represent a high degree of future dangerousness to the community. And the Commonwealth must establish that fact through the evidence and must prove it beyond a reasonable doubt that he would represent a probability of future dangerousness.

What better way to prove future dangerousness than to show that this man has committed other murders? And that's precisely what the Commonwealth is doing.

I think based on the *Watkins* case, the *Quintana* case, as well as the *Peterson* case the Commonwealth is clearly without any question whatsoever entitled to introduce this evidence.

I would therefore respectfully ask that the Court overrule defense counsel's motion.

MR. MOORE: Your Honor, I would like to take a matter up with the Court. I hate to [780] take up any more time, however, the Commonwealth has mis-stated something that's put the shadow on the defense counsel, and I want to clear it up.

He has stated that he made this available to us at the beginning of the trial. That is not true. He said that he was going to bring in statements that our man had confessed, that Gray had confessed to other people. That is true. We were aware of that. We were prepared for that.

But, what he is going to do today is not what he said he was going to do at the beginning of trial. He said he was going to bring in evidence that he, that Gray, had confessed to other people.

My point is that we were ready for that. That's alright. But now, within the last few hours we learn that not only is he going to get that in, which we were prepared for, he's going to put on photographs of people, which we're not prepared for, and goes beyond that.

So, if he's going to mislead anybody as to what we were told, I want to clear the record up for that right now. We were not told this was coming in.

THE COURT: Well, gentlemen, you were aware of it yesterday.

MR. MOORE: Yes, sir. That's too short a time to be prepared for it.

THE COURT: At the conclusion of [781] the guilt stage we discussed the penalty stage, and at that time Mr. Ferguson made you aware of what his evidence was going to be. I'm going to overrule your motion and note your exception in the record. let's take a short recess.

MR. MOORE: Thank you.

TRIAL CONTINUING IN THE COURTROOM AFTER A BRIEF RECESS AND THE MEMBERS OF THE JURY PANEL WERE PRESENT IN THE COURTROOM AND SEATED IN THE JURY BOX.

THE COURT: All right, sir.

MR. FERGUSON: Call Detective Slezak.

DETECTIVE M. I. SLEZAK, having been first duly sworn, was called as a witness on behalf of the Commonwealth, and testified as follows:

DIRECT EXAMINATION

BY MR. FERGUSON:

Q Would you state your name for the Court and members of the jury, please?

A M. I. Slezak, police officer, City of Chesapeake.

Q And Detective Slezak, would you [782] speak up loud – it's difficult to hear in here – so all the members of the jury can hear you? Detective Slezak, I want to take your attetion [sic] back to December the 10th of 1984. Did you have occasion to respond to a location here, in the Greenbriar section of the City of Chesapeake?

A It wasn't near Greenbriar. It was approximately five miles from Greenbriar.

Q All right. Speak up, now, so all the members of the jury – Talk louder than normal so they can hear you, if you would.

A It was approximately five miles from Greenbriar. It was in the Deep Creek borough of Chesapeake.

Q Tell us what happened when you arrived at the scene, what you observed, et cetera.

A There was a four door burgundy colored Honda automobile. Preliminary check –

Q Speak up, Detective. I'm having a hard time hearing you.

A All right, sir. When we approached the vehicle the windows were blacked out. We couldn't see inside. Finally entrance was gained in the car and we found the

body of a black female inside. She was later identified, and subsequent investigation revealed that there was another body, that of a small child, found in the trunk of the car.

Q Who was the person found in the [783] front?

A Lisa Sorrell.

Q All right. And who was found in the trunk?

A Shanta Sorrell, her daughter.

Q All right. Now, Detective Slezak, I have some photographs which I would like to show you and ask if you can depict, or tell us what that photograph depicts.

A Yes, sir. This is the righthand side, or the passenger side, of the vehicle with the doors open. This is the vehicle that was – that contained Lisa's and Shanta's body. This is Lisa Sorrell –

Q Speak up, now.

A This is Lisa Sorrell in the right front passenger's side of the vehicle.

Q All right, sir.

MR. FERGUSON: Your Honor, I would ask that this photograph be marked and introduced into evidence as Commonwealth's Exhibit Number "1", or excuse me, number –

MR. MURDEN, CLERK: "45".

MR. FERGUSON: I'm sorry, "45".

MR. FERGUSON, Continuing-

Q Detective Slezak, I show you this second exhibit and ask you if you can identify that?

[784] A This is the right, or the left hand side of the vehicle, showing the interior of the same vehicle.

Q All right. What is shown on that particular photograph?

A The debris on the front, in the front floorboard of the car, paper that had been set on fire, the interior damage to the car where it had been burned, a match on the front seat, the victim's body, the car seat, child car seat in the back seat, the interior damage of the vehicle.

Q All right. Was there any burnt damage inside the car itself?

A Oh, yes, sir.

Q Tell us about that.

A The visors, the sunvisors in the car had melted down from the heat. There was charring on the left front door or the driver's door. There was soot throughout the interior of the car.

Q How about on the windshield, the inside?

A All over the interior of the car. It appeared that it had been blacked out. You couldn't see inside the car for the residue on the windows.

Q All right, sir. Detective Slezak, I show you –

MR. FERGUSON: Your Honor, I would ask that that photograph also be introduced [785] into evidence as a Commonwealth's exhibit.

MR. MOORE: Note my objection, Your Honor.

MR. FERGUSON, Continuing-

Q I ask You to identify that next photograph.

A This is a photograph of the same vehicle. It shows the burnt damage to the door, the interior of the floorboard where paper and items from the victim's purse had been removed and had been burned. It shows the match on the front seat, front seat of the car, driver's seat.

Q All right.

A And it shows the victim.

Q When you opened the door were you able to detect any odors or smells?

A It smelled smokey.

Q All right. Detective Slezak, I show you this next photograph.

MR. FERGUSON: Your Honor, I would ask that that also be marked and introduced.

THE WITNESS: There was also a –

MR. MURDEN, CLERK: "47".

THE WITNESS: an odor I would describe as a plastic odor. It smelled like plastic or glue; something similar to that.

[786] *MR. FERGUSON, Continuing-*

Q Detective Slezak, I show you this next photograph and ask you if you can identify that?

A Yes, sir. It's taken from the passenger's side of the car. It shows Lisa Sorrell in the floorboard and on the seat, the sun visors melted and deposited on the back of her jacket.

Q Was that this dark substance that's on the – appears in this photograph?

A Yes, sir.

MR. FERGUSON: I ask that that be marked and introduced as a Commonwealth's exhibit.

MR. FERGUSON, Continuing-

Q I show you this next photograph and ask you if you can tell us what that depicts?

A It depicts the interior of the vehicle, the items –

THE COURT: Speak up, now, so all the members of the jury can hear.

A – items that were removed from the victim's purse, paper articles. There was a trash bag inside, that was burned; a cassett [sic] tape in the vehicle; a match, a burnt match; the victim's body; and the interior of the vehicle.

Q All right.

MR. FERGUSON: I would ask that [787] that be marked and introduced as a Commonwealth's exhibit.

MR. MURDEN, CLERK: "49".

MR. FERGUSON, Continuing-

Q All right. Now, Detective Slezak, I show you this next photograph and ask you if you can tell us what that depicts?

A Yes, sir. It's the trunk of the same car that was in the other photographs, and it is a photograph of Shanta Sorrell, the victim's daughter.

Q All right.

MR. FERGUSON: Your Honor, I would ask that be marked and introduced into evidence as a Commonwealth's exhibit.

MR. FERGUSON, Continuing-

Q I show you this next photograph and ask you if you can tell us what that depicts?

A It's Lisa Sorrell.

Q And what is that? Where was that taken, or when was that taken?

A This was taken at police headquarters in the evidence building.

Q Is that –

A After she was removed from the car.

Q And is this the same individual [788] that you found in the front seat of the vehicle:

A It is.

Q Finally, I show you this.

MR. FERGUSON: I ask that that be marked and introduced as a Commonwealth's exhibit in these proceedings.

MR. FERGUSON, Continuing-

Q Finally, I show you one other photograph and ask you if you can identify that last one?

A It's the body of Shanta Sorrell.

Q Does that show a frontal view of her?

A Yes.

Q And is that the same individual that you found in the trunk of the vehicle?

A It is.

Q Now, when you all arrived at that particular location was the trunk shut or open?

A It was closed.

Q How did you all happen to get in the trunk?

A With a – There's a release mechanism on the interior of the car. We lifted the release mechanism and it opened.

Q Speak up, now.

A There's a release mechanism on [789] the interior of the car by the driver's seat. We pulled it and it released the lock. Then we lifted the trunk lid.

Q Were you able to visibly observe any –

MR. FERGUSON: Excuse me, Your Honor. I ask that this be marked and introduced into evidence as Commonwealth's Exhibit Number –

MR. MURDEN, CLERK: "52".

MR. FERGUSON: – "52".

MR. FERGUSON, Continuing-

Q Detective Slezak, let me ask you this: When you observed this did you observe any visible signs of injury specifically to Lisa Sorrell that you could observe with your eyes?

A There was what – There was a reddish sibstance [sic] on her clothing and parts of the car that appeared to be blood. It wasn't until I saw her again at the medical examiner's office that I saw any wounds.

Q All right now, both of the individuals that you found at the locations when you found them, were they both dead at that time?

A Yes.

Q Now, did you have occasion – Were they then taken to the medical examiner's office for [790] purpose of conducting an autopsy to determine cause of death?

A Yes, sir; they were.

Q And was that autopsy conducted by Dr. Presswalla of the medical examiner's in this Tidewater area?

A It was.

Q And were the two people that he examined, in fact, the same two people that you had found in the automobile itself in Chesapeake?

A They were.

Q And you, I believe, previously identified the two people as Lisa Sorrell and Shanta Sorrell; is that correct?

A Yes, sir.

Q Which one was the mother?

A Lisa.

Q All right.

MR. FERGUSON: Your Honor, I have no further questions for Detective Slezak. I would like to pass the photographs in question to the jury in the order they were – Is there one – I believe there's one still outstanding up there.

THE COURT: Before this is done, do you gentlemen have any questions about the photographs? Do you want to use them for any purpose?

[791] MR. MOORE: We have expresed [sic] our opinion with respect to them, Your Honor.

THE COURT: Do you want to use them in any examination before we give them to the jury?

MR. MOORE: No, sir.

THE COURT: All right.

(The previously marked photographs were published to the jury.)

THE COURT: All right. Mr. Moore, do you have any questions of the detective?

CROSS EXAMINATION

BY MR. MOORE:

Q Was this case highly publicized, Detective Slezak?

A It was publicized.

Q Newspapers, radio, television?

A Yes, sir; certainly.

Q In fact, it went on for several days; didn't it?

A Yes, sir.

Q Received regional coverage in the news media?

A I think that would be accurate.

[792] Q And the details of the crime were made visible by virtue of the news media to everybody; were they not?

A What was made visible? I didn't understand you.

Q The scene of the crime, the automobile, the burnt automobile, and the bodies?

A The vehicle was visible to the news media. The bodies were not visible.

Q So, they were viewed by photographing or filming it, or whatever, seeing the condition, the burned condition and things of that nature; is that correct?

A No, that's not correct.

Q Well, if they filmed it from a distance they can certainly tell it; can't they?

A The exterior of the car would be seen by the news media, but not the interior.

Q It was never seen by anybody?

A Well, certainly it was. To my knowledge it has not been seen by any member of the news media.

Q Well, the details of the evidence were made public knowledge by virtue of newspaper articles; was it not?

A There was some indication, or there was some references made in the newspapers that were inaccurate. Certainly some of the information [793] that was obtained was released to the news media, but all of it was not; no, sir.

Q The fact that it was inaccurate doesn't necessarily mean that there's anything unusual about that; does it?

A Well, there are inaccuracies everywhere.

Q Yes, sir. Has this man been charged with these crimes?

A No, sir.

Q What's a copycat killing?

A It's a similar crime that's generally referred to that someone else had committed.

Q I mean, ya'll are taught that at the crime line or crime school, are you not, what a copycat killing is?

A I think there's some reference made to it.

Q And basically it's what, now?

A Where one person would pattern a crime after another individual to take the suspicion off of him.

Q A copycat crime basically is somebody who learns about how to do one crime by reading about another; is that right?

A It may come to him by reading it or it may be some idea of his own.

MR. MOORE: No further questions.

[794] MR. FERGUSON: I have no further questions. I would ask that Detective Slezak remain. I don't think I'll need him, but rather than release him this second I would ask him to remain just momentarily.

THE COURT: All right. That's all.

MR. FERGUSON: Dr. Presswalla.

(Discussion off the record.)

DR. FARUK B. PRESSWALLA, having been first duly sworn, was called as a witness on behalf of the Commonwealth, and testified as follows:

DIRECT EXAMINATION

BY MR. FERGUSON:

Q would you state your name for the Court and members of the jury, please?

A Faruk, F-a-r-u-k, Presswalla, P-r-e-s-s-w-a-l-l-a.

Q And what is your position or occupation, Dr. Presswalla?

A I'm the Deputy Chief Medical Examiner for the Tidewater Region.

Q And in that capacity what do you do? What is your function in that capacity?

A I investigate sudden, unexpected, [795] unusual, unnatural, and violent deaths, deaths in legal custody, and deaths in which cremation or disposing at sea is the method of disposition of the body.

And in the course of the investigation I do autopsies when necessary with a view to determining the cause and manner of death, and obtaining any medical, legal information which may help explain the circumstances surrounding the death.

Q Can everybody on the jury hear? All right. If you can't if you would raise your hand, I'll get him to sepak [sic] up. Thank you.

Now Dr. Presswalla, how long have you been a medical examiner with the State of Virginia?

A For the past approximately nine years.

Q All right.

MR. FERGUSON: Mr. Eason, is there any question about his qualifications as an expert?

Mr. Eason: We would certainly stipulate as to his qualifications, Your Honor.

THE COURT: All right, sir.

MR. FERGUSON, Continuing-

Q Dr. Presswalla, in that regard did you have occasion to examine and conduct an autopsy on the bodies of Lisa Sorrell and Shanta Sorrell?

A I did.

[796] Q All right. And Dr. Presswalla, would you tell us when did you make this examination of those two people?

A This was on the 11th of December, 1984.

Q And what did your – Let's take them one at a time. What did your examination of Shanta Sorrell reveal?

A Shanta Sorrell was a baby, three years old, and my examination revealed that she had died as a result of carbon monoxide inhalation. Carbon monoxide is a noxious gas which is produced any time there is incomplete combustion. So, whenever there is any kind of combustion part of the combustion is complete, which produces carbon dioxide, and the part that's incomplete produces carbon monoxide.

This is present in any fire, whether it be smouldering [sic] or hot. It's also present in automobile exhausts. She died as a result of inhaling this which then combined with the hemoglobin in the blood and therefore prevented the blood from carrying oxygen, and kills the person.

Q Dr. Presswalla, did you examine specifically, the windpipe of her body?

A Yes.

Q What did you find in the windpipe?

A I found evidence of soot inhalation, that is, carbon from smoke. This is something that [797] would take place with a fire, especially if there is smouldering [sic]. You do not see soot if it's from the automobile exhaust.

Q All right. And Dr. Presswalla, did you have occasion to file your report in this particular case regarding Shanta Sorrell?

A I did.

Q Dr. Presswalla, I show you first of all this photograph and ask if you can identify that photograph for the members of the jury?

A Yes, I can.

Q And who is that a photograph of?

A This is Shanta Sorrell, on whom I performed this autopsy, about whom I was referring just now.

Q Dr. Presswalla, does this medical examiner's report, is this your report that you filed in this particular case, excluding the hearsay information about how you came into contact with the bodies and those kinds of things?

A Yes.

Q All right.

MR. FERGUSON: Your Honor, I would like the record to reveal that we have struck from the summary certain hearsay information about how the body was discovered, where it was discovered, that Dr. Presswalla, I assume, has no personal knowledge of; is [798] that correct?

THE WITNESS: Well, that was reported to me in the normal course of business by my local medical examiner who went to the scene. I did not go to the scene.

MR. FERGUSON: Right. That's fine. Your Honor, we would offer the photograph into evidence as Commonwealth's Exhibit Number-

MR. MURDEN, CLERK: "53".

MR. FERGUSON: And the autopsy report as Number "54".

MR. EASON: Your Honor. we have no objection to the report as it has been changed by the court, of course, subject to our continuing objection on the whole matter.

MR. FERGUSON, Continuing-

Q Now Dr. Presswalla, did you also conduct an examination and autopsy on Lisa Sorrell?

A Yes, sir; I did.

Q Would you tell us the results of that examination?

A Lisa Sorrell was a young lady, and she showed evidence of gunshot injuries. She had six gunshot wounds to the back of her head, all located in an area to the back and to the right of the midline, right about here. (Indicating.) Of these six gunshot injuries, two of the bullets had [799] passed through the head and exited and I could not find those bullets. The other four had stayed in the head and I recovered those bullets and they appeared to be .32 caliber bullets. Apart from the gunshot injuries she had only a minor scrape on her wrist.

Q Dr. Presswalla, I show you this photograph and ask you if you can identify that for the members of the jury?

A Yes, I can.

Q What is that?

A This is a photograph depicting the back of the head where I shaved the head to depict the gunshot wounds of Lisa Sorrell.

Q All right. And I show you this second photograph and ask you if you can identify that?

A Yes. That's a closer view of the same area.

Q All right. Shows it more clearly, the six wounds?

A Yes, sir.

Q All right.

MR. FERGUSON: Your Honor, I would ask that these two photographs be marked and introduced into evidence as Commonwealth's exhibits in these cases.

MR. FERGUSON, Continuing-

[800] Q Finally, I show you this medical examiner's report and ask if that is the report that you filed in these proceedings and sets forth the nature and extent of the wounds?

THE COURT: I'm only going to admit one of them.

MR. FERGUSON: I will simply offer, the first one will be sufficient. I think it shows the face, as well as the wounds. That's sufficient.

THE COURT: All right.

MR. MURDEN, CLERK: "55".

MR. FERGUSON, Continuing-

Q Does this reflect your report, Dr. Presswalla?

A Yes, sir; this does.

Q And as in the other case, I believe, in the report that is being filed any evidence which may constitute hearsay, that is that you didn't have, was deleted from the report or from the summary; is that correct?

A Yes, sir.

Q All right.

MR. FERGUSON: Your Honor, we would offer these two exhibits into evidence as Commonwealth's exhibits. I would withdraw the earlier.

[801]THE COURT: That's the one you want?

MR. MURDEN, CLERK: That's been marked.

THE COURT: That's the one you handed me that you wanted.

MR. FERGUSON: I appologize [sic]. I misunderstood the Court. It makes no difference.

MR. MOORE: If it doesn't make any difference, we want the smaller one.

MR. FERGUSON: It makes no difference. That's fine. I'll simply withdraw this one.

MR. FERGUSON, Continuing-

Q Now Dr. Presswalla, specifically were you able to determine the cause of death first of all of Shanta Sorrell?

A Yes, sir; I was.

Q What was the actual cause of death?

A She died as a result of carbon monoxide intoxication.

Q And were you also able to determine the cause of death of Lisa Sorrell?

A Yes, sir; I was.

Q And what was the cause of death of Lisa Sorrell?

A She died as a result of multiple gunshot wounds, namely the six gunshot wounds to her head which injured her brain.

Q Dr. Presswalla, in reference to [802] Lisa Sorrell, could you tell us whether any one of those six wounds to the back of the head could have been fatal?

A Yes, sir.

Q Any one of the six would have been fatal alone?

A Yes.

Q All right.

MR. FERGUSON: Your Honor, I have no further questions for Dr. Presswalla. I would like to show the exhibits to the members of the jury.

THE COURT: All right, Mr. Moore?

(The previous exhibits were published to the jury.)

MR. EASON: We have no questions, Your Honor.

THE COURT: All right. Do you need Dr. Presswalla any further?

MR. FERGUSON: We have no further need for Dr. Presswalla. As far as I'm concerned he's free to be excused.

THE COURT: All right, Doctor, thank you. You may go.

THE WITNESS: Thank you, sir.

MR. FERGUSON: Your Honor, the Commonwealth rests.

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[881] * * *

CLOSING ARGUMENT
BY MR. FERGUSON:

Members of the jury, I first of all would like to again thank you. You have sat through four days, this is the fifth day, and it's certainly been a long and trying trial. At the same time, as I indicated to you yesterday, without you [sic] presence here there's no way this case could even have been tried. I would like to thank you for your attention as well as your presence during the course of this case.

Today we're at a little different situation than we were yesterday. Yesterday you-all had to decide whether this man was guilty of the crimes charged. That is, whether or not he was the trigger man.

Today that is no longer an issue, for you have already resolved that issue. Therefore, the only question before you today is one of what sentence should be imposed on this defendant.

Now, in determining that question the Court has given you instructions which pretty well set forth very clearly what the Commonwealth must prove in order for you to impose the death penalty, and the Commonwealth must prove to you beyond a reasonable doubt one of two things.

Number one, we must prove to you that after consideration of this defendant's background and prior [882] history – and you have heard all the testimony that's been presented today relative to his prior background and history – that there is a probability that he would

commit criminal acts of violence that would constitute a continuing serious threat to society. That is, is he a threat to society in the future? And so, at issue is does he have a future dangerousness situation, is he a danger to the community in the future, and that is the question, based on his prior history and background.

Of, if for some reason you didn't believe that prong was there, you could convict him based on the crime itself; that is the murder, the brutal murder of Richard McClelland, was outrageously or wantonly vile, horrible, or inhumane in that it involved either torture, depravity of mind, or aggravated battery to the victim.

And the Commonwealth only has to prove to you one of those two prongs of the test.

Now members of the jury, I would suggest to you that not only has the Commonwealth proven one of those two prongs, the Commonwealth in this case has proven both prongs of the test beyond a reasonable doubt. And I would like to take just a few moments with you to go through and show to you how we have proven each of the two elements or the prongs, the test prongs, under which the death penalty could be imposed.

* * *

[887] You have also heard testimony in this particular case from Melvin Tucker relative to a statement that the defendant made to him relative to the Sorrell murders. And the defendant, Coleman Gray, told Tucker as they were going up the steps one day – it was some girl that had been saying things or the rumors were going through the neighborhood about his involvement in the Murphy's

Mart case – and Coleman Gray, in very graphic language indicated that he could take her off just like he had taken some other girl off.

And then when he went upstairs when he was talking about that other girl, he showed Melvin Tucker [888] who he was talking about in the newspaper and pointed to a picture of Lisa Sorrell.

Now, you have heard testimony from Detective Slezak in this case, who went to the scene and discovered the automobile where the body of Lisa Sorrell, the mother, and a young child were found in the trunk, and the testimony and the evidence has shown that that car was set on fire just like the one in the Richard McClelland case. And not only that, but that the method of death, the method of execution for Lisa Sorrell was by .32 caliber weapon, same caliber weapon as we have in this case, six shots to the back of the head – identical to the Richard McClelland case. She was stuffed in the car, matches found on the seat, tried to burn the car up; obviously the fire went out.

But it didn't go out in time enough for Shanta Sorrell, for Shanta Sorrell was put in the trunk of the car. That child had no way to get out, and she lay there and died of carbon monoxide poison with soot backed up all in her throat, and Dr. Presswalla indicated that was from the fire, not from any gasoline or car running. When you find soot in the throat that's from the car being burnt up.

Now, members of the jury, if that pattern of criminal conduct does not indicate a person who would have a probability of continuing to commit criminal [889] acts of violence or criminal acts in the future, then there is no

such record that can, for the crimes that you have heard about that this defendant has committed and been convicted of, or alternatively admitted doing, are simply atrocious. They're murder, robberies, brutal systematic execution-style crimes; and those crimes are the same kinds of crimes that you had before you when you heard the facts on the Murphy's Mart case.

So, when you couple the vileness of the Murphy's Mart case itself and look at this man's prior criminal history it leads to one and only one conclusion, and that is that Coleman Wayne Gray, after considering his history and background, not only there's a probability, but that frankly there is an absolute certainty that he would commit criminal acts of violence that would constitute a continuing serious threat to society.

So, based on that evidence there can be no question that the Commonwealth in this case has not only proven beyond a reasonable doubt, but has proven beyond all doubt that this defendant has a propensity to future dangerous criminal conduct. On that prong alone you, as members of the jury, have the right to impose a penalty of death.

* * *

[893] Now members of the jury, you have heard the evidence, and I suggest to you that not only has the Commonwealth proven beyond a reasonable doubt both prongs of the test necessary for you to impose a sentence of death, we have proven to you beyond all doubt two things. Number one, that the defendant does constitute a serious continuing threat to society in that there is a probability that he will continue to commit future crimes

of violence. There can be no question about that. He's committed murder after murder, many in the same style, and he's done it to Richard McClelland, he's done it to a man in California, he did it to Lisa Sorrell, and he even did it to Shanta Sorrell, the little daughter; he shot Ron Whitte, and it's fortunate that the last bullet didn't strike him or one of the members of his family.

* * *

[896] I think what it boils down to is there are simply certain crimes in which a defendant demonstrates that he is no longer capable of living in the human society, and Coleman Wayne Gray has demonstrated that in this case. He's demonstrated it in the Whitte case. He's demonstrated it in the killing of the man in California, and he's demonstrated it in the brutal manner in which Lisa and Shanta Sorrell were murdered.

This man has forfeited his right to live with other human beings, not because of anything anybody's done to him, but by his own acts.

* * *

[897] There is really very little I can say at this point. I have said all that really can do. The only thing I can leave you with is this: Coleman Wayne Gray has been tried. He has had twelve jurors to sit and listen to this case. He has had a separate penalty hearing. He's been represented by very capable attorneys. He has been afforded all due process there is.

* * *

[907] *FINAL ARGUMENT*

BY MR. FERGUSON:

Q Members of the jury, I will not be long. There are a few things I would like to say to you. First of all, Mr. Moore talks about [908] your sitting in judgment of another human being. Let me ask you a question: Did Coleman Gray sit in judgment of Richard McClelland; did he sit in judgment of Ron Whitte; did Coleman Gray sit in judgment of the man in California that he killed; and did he sit in judgment of Lisa and Shanta Sorrell without charges, without trial, without due process, without anything, other than a gun?

Nobody put the gun in his hand but himself. He chose to use it in each of these cases, and when he does, then he must pay the penalty for it.

You have already determined guilt in this case. That is not an issue. Your only concern is what is a just punishment.

As I indicated to you earlier, and as you took your oath, you took an oath that if a proper case is presented, each of you indicated to the Court when Judge Godwin asked the question, If a proper case is presented to you can you personally impose the penalty of death? And each and every one of you indicated yes.

Well, members of the jury, in this particular case the Commonwealth has presented to you a proper case for the death penalty. We have shown not only the facts of the McClelland case itself, but also the other brutal, vicious, and vile acts that this defendant has committed.

It seems to me that he has already been [909] given an opportunity, a chance to straighten himself out. And it is very, very clear, or should appear clear to you based on the evidence that he has no regard for anybody else's human life. He laughed about the killing of McClelland, thought it was funny. And he aslo [sic] carried out these other brutal, brutal, vicious acts.

Members of the jury, Mr. Moore has talked to you about a number of Biblical citations and I don't intend to stand up here and quote the Bible for you. The same time he was quoting about mercy and the other things, and forgiveness, I ask you one question: What mercy was shown by him to Richard McClelland or any of the other victims that you have heard about? And the answer is absolutely none whatsoever.

I also point out to you that the Law of Moses recognized three different modes or form of executing capital offenders, straight out of the Bible, by burning, stoning, or hanging. The Law of Moses also imposed the death penalty for some twenty different types of crimes, one of which was murder.

In addition to that in the New Testament Paul states the principal of capital punishment in Acts 25:11, for he says that,

> "If I be an offender or have committed anything worthy of death, I refuse not to die."

[910] Well, members of the jury, that's exactly what we have in this case. And based upon that testimony I ask you to find this defendant – You have already found him guilty, and I ask you to impose a sentence of death; for I think the question that each of you must answer in this

case is not whether you can live with yourselves if this defendant is sentenced to death. The question is, can you live with yourselves after hearing all the testimony, all the evidence, all the different crimes of murder and otherwise that this defendant has committed, can you live with yourselves if you don't? And that is the question.

Based on that I ask you to impose a sentence of death. If there was ever a case where it's justified the Commonwealth has presented it to you today and throughout this week.

Thank you very much.

* * *

Coleman Wayne GRAY

v.

COMMONWEALTH of Virginia. (Two Cases)

Record Nos. 860373, 860374.

Supreme Court of Virginia.

April 24, 1987.

Present: CARRICO, C.J., and COCHRAN,* POFF, COMPTON, STEPHENSON, RUSSELL and THOMAS, JJ.

STEPHENSON, Justice.

Coleman Wayne Gray was indicted for the capital murder of Richard M. McClelland in the commission of robbery, Code § 18.2-31(d), the robbery of McClelland, the abduction of McClelland, the use of a firearm in the commission of each of those felonies, and the arson of McClelland's automobile. The robbery occurred on May 2, 1985, at Murphy's Mart store in the City of Portsmouth where McClelland was the manager. A jury convicted Gray of all counts, fixing his punishment at life imprisonment on the robbery charge, life imprisonment on the abduction charge, 10 years in the penitentiary on the arson charge, and four years in the penitentiary on each of the firearm charges.

Pursuant to the bifurcated-trial procedure for capital murder cases, a separate penalty trial was conducted on the capital murder conviction. Code § 19.2-264.4. In the penalty trial, the Commonwealth presented evidence of

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* Justice Cochran participated in the hearing and decision of this case prior to the effective date of his retirement on April 20, 1987.

aggravating factors and Gray introduced evidence in mitigation.

The jury fixed Gray's sentence at death. Following a sentencing hearing conducted pursuant to Code § 19.2-264.5, the trial court imposed the death sentence. Thereafter, the trial court entered judgments on all the verdicts.

We have consolidated the automatic review of Gray's death sentence with his appeal from his conviction of capital murder, Code §§ 17-110.1(A) and – 110.1(F), and have given them priority on our docket, Code § 17-110.2. By order entered May 8, 1986, the appeals of the other convictions were certified from the Court of Appeals and consolidated with the capital murder appeal. Code § 17-116.06.

I

PRETRIAL PROCEEDINGS

A

Constitutionality of the Death Penalty Statute.

Gray makes various challenges to Virginia's death penalty statute, each of which we have previously rejected. He first contends that the death penalty violates the proscription against cruel and unusual punishment contained in the Federal and Virginia Constitutions. In accord with our previous decisions, we again reject this contention. *See, e.g., Boggs v. Commonwealth*, 229 Va. 501, 505, 331 S.E.2d 407, 411 (1985), *cert. denied*, 475 U.S. ___, 106 S.Ct. 1240, 89 L.Ed.2d 347 (1986); *Stockton v. Commonwealth*, 227 Va. 124, 134, 314 S.E.2d 371, 378, *cert. denied*,

469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984); *Whitley v. Commonwealth*, 223 Va. 66, 77-78, 286 S.E.2d 162, 168-69, *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982); *Bassett v. Commonwealth*, 222 Va. 844, 851, 284 S.E.2d 844, 849 (1981), *cert. denied*, 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458 (1982); *Stamper v. Commonwealth*, 220 Va. 260, 267, 257 S.E.2d 808, 814 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980); *Mason v. Commonwealth*, 219 Va. 1091, 1095, 254 S.E.2d 116, 118-19, *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); *Waye v. Commonwealth*, 219 Va. 683, 698-99, 251 S.E.2d 202, 211-12, *cert. denied*, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979); *Smith v. Commonwealth*, 219 Va. 455, 476, 248 S.E.2d 135, 148 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979).

Gray next contends that the aggravating factors which a jury must find in order to impose the death penalty, *see* Code § 19.2-264.2,[1] are unconstitutionally

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[1] Code § 19.2-264.2 reads as follows:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

vague and overbroad and "an open invitation to allow an arbitrary and irrational decision." We reaffirm our previous rejection of this contention. *See, e.g., Watkins v. Commonwealth*, 229 Va. 469, 490, 331 S.E.2d 422, 437-38 (1985), *cert. denied*, 475 U.S. ___, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986); *Stockton*, 227 Va. at 134-35, 314 S.E.2d at 378; *Bunch v. Commonwealth*, 225 Va. 423, 441, 304 S.E.2d 271, 281, *cert. denied*, 464 U.S. 977, 104 S.Ct. 414, 78 L.Ed.2d 352 (1983); *Smith*, 219 Va. at 476-78, 248 S.E.2d at 148-49.

Finally, Gray argues that Virginia's sentencing scheme is "overbroad, vague and facially unconstitutional" because Code § 19.2-264.2 allows a jury to examine an accused's "past criminal record" while Code § 19.2-264.4(C)[2] provides for examination of his "prior history." For reasons expressed in previous decisions, we again reject this argument. *See Watkins*, 229 Va. at 487, 331 S.E.2d at 435-36; *LeVasseur v. Commonwealth*, 225 Va. 564, 593-94, 304 S.E.2d 644, 660 (1983), *cert. denied*, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984).

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[2] Code § 19.2-264.4(C) reads as follows:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

B

Admissibility of Statements Made by Gray to the Police.

Gray contends that his statements to the police were "involuntary." He argues that his statements were not voluntary under either the requirement set forth in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), or the "totality of circumstances" standard.

Gray gave statements to the police on two occasions. The first statement was given to Officer Freeman on the morning of May 22, 1985. The second statement was given to Sergeant Lilley and Detective Bunker on the evening of May 23, 1985.

Freeman testified at the suppression hearing that at 8:30 a.m. on May 22, 1985, Gray, who was in a holding cell at the Suffolk jail, "shouted out that he wanted to talk to me." Freeman walked to the cell, and Gray said he "wanted to get something off his mind that had been bothering him."

Approximately 9:30 a.m., after Gray had eaten breakfast, he was brought to Freeman's office. Freeman told Gray that he would not talk to him unless Gray executed a "Legal Rights Advice Form." Freeman then presented Gray with a form and read each question on the form to him. Gray executed the form, which reads as follows:

SUFFOLK POLICE DIVISION

Legal Rights Advice Form

Date May 22, 1985

1. Do you understand what you may be charged with?
Armed Robbery
Yes

2. Do you understand that you have the right to remain silent?
Yes

3. Do you understand that any statement you make may be used as evidence against you in a court of law?
Yes

4. Do you understand that you have a right to talk to a lawyer and to have the lawyer present during all questioning, if you so desire?
Yes

5. Do you understand that if you cannot afford to hire a lawyer, a lawyer will be appointed to represent you and be present during all questioning, if you so desire?
Yes

6. The above rights have been fully explained to me, and I sign this paper with complete understanding of them. I further state that I waive these rights and desire to make a statement. I understand that I have the right to stop answering questions at any time.
Yes

7. This statement is completely free and voluntary on my part without any threats or promises from anyone.
Yes

Witness
/s/ Lt. W. A. Freeman

Witness _____

Date 5/22/85 Time 9:33 A.M.

Suffolk Det. Bur
Exact Location

/s/ Coleman W. Gray
Signature of Person Being Advised of His Rights
Date 5/22/85
Time 9:35 A.M.

_____
Exact Location

Freeman testified that after executing the form, Gray, without any questioning by Freeman, became "emotional," and began walking around the room, hitting the wall and exclaiming, "the man wasn't supposed to die." Freeman suggested that Gray "[c]alm . . . down, just sit down [and] [t]ell me what happened."

Without any questioning or interruption by Freeman, Gray proceeded to give him a detailed account of how the offenses had occurred. Gray admitted he had participated in the commission of the crimes with Melvin Tucker, but stated that Tucker actually shot McClelland. Gray told Freeman: "I'm not going to let you write anything. When we get into court it will just be your word against mine." After the interview, Freeman immediately returned to his office and reduced his recollection of Gray's statements to typewritten form.

On the evening of May 22, Gray told Detective Lilley that he wanted to talk with him, saying he would tell "everything." Lilley told Gray that he would talk with him after the arraignment the following day. On the

morning of the 23rd, Gray again told Lilley that he wanted to talk with him. Lilley first contacted Gray's court-appointed counsel and arranged for him to interview Gray. When he arrived at the police station, Gray's counsel conducted a lengthy interview with him.

After his attorney left, Gray again "demanded" in the presence of the Suffolk Chief of Police and Detective Bunker that he be allowed to speak with Lilley. Bunker testified at the suppression hearing that Gray asked him what he should do. Bunker asked Gray, "[W]hat did your attorney tell you to do?" Gray said, "My attorney told me to not say anything," to which Bunker responded, "Well, then you should do what your attorney said." Gray, however, said, "No, I want to talk to Sergeant Lilley."

Thereafter, Lilley was contacted and he, Bunker, and Gray went to Lilley's office. Gray executed another rights form containing essentially the same questions and answers as the one he had executed for Freeman the preceding day. Gray then gave Lilley a lengthy and detailed statement in question and answer form. The statement was tape-recorded on a machine that was in full view of Gray at all times, and he saw tapes being changed. When transcribed, the statement consisted of 78 typewritten pages. In his statement to Lilley, Gray again admitted his participation in each of the crimes for which he was charged, but continued to assert that Melvin Tucker was the person who shot McClelland.

Gray contends on appeal, as he did at the suppression hearing, that he would not have made any statements had he known that an unwritten statement could be used against him. He also claims he did not fully

understand what his signature on the rights form meant. Additionally, Gray claims that the police made certain statements to him that were coercive or threatening or that contained promises of leniency. The police denied making threats, promises, or coercive statements.

The trial court found that Gray desired to make the statements and did so without promises, inducements, or intimidation. The court also concluded that Gray understood thoroughly his constitutional rights as set forth in Miranda.

A defendant's waiver of his Miranda rights is valid only if the waiver is made knowingly, voluntarily and intelligently. Miranda, 384 U.S. at 475, 86 S.Ct. at 1628. Whether a statement is voluntary is ultimately a legal rather than factual question. *See Miller v. Fenton*, 474 U.S. 104, ___, 106 S.Ct. 445, 450, 88 L.Ed.2d 405 (1985). Subsidiary factual questions, however, are entitled to a presumption of correctness. *Id.* at ___, 106 S.Ct. at 451. The test to be applied in determining voluntariness is whether the statement is the "product of an essentially free and unconstrained choice by its maker," or whether the maker's will "has been overborne and his capacity for self-determination critically impaired." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S.Ct. 2041, 2046, 36 L.Ed.2d 854 (1973). In determining whether a defendant's will has been overborne, courts look to "the totality of all the surrounding circumstances," *id.* at 226, 93 S.Ct. at 2047, including the defendant's background and experience and the conduct of the police, *Correll v. Commonwealth*, 232 Va. 454, 464, 352 S.E.2d 352, 357 (1987); *Stockton*, 227 Va. at 140, 314 S.E.2d at 381.

Gray was nearly 28 years old at the time of the offense. He possessed a high school equivalency diploma and stated that he could read and write. Gray initiated both conversations with the police. He stated that he understood the legal rights advice form, and his 12-year involvement with police and law enforcement procedures corroborates his statement. In addition to carefully explaining the waiver forms, the police repeatedly told him that they could make no promises or guarantees, and Gray indicated he understood. The police told Gray numerous times that he had a right to have his attorney present, a right to stop answering questions at any time, and that anything he said could be used against him. Gray indicated that he understood and repeatedly told the police that he wanted to talk.

Our review of the record reveals that Gray's right to have counsel present and his privilege against self-incrimination were "scrupulously honored" by the police. *See Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975). From an assessment of the totality of all the surrounding circumstances of the present case, we conclude, as did the trial court, that Gray's statements to the police were made freely, knowingly, and voluntarily and that his Miranda rights were not violated.

C

Gray's Telephone Statement to Officer Moore.

Gray moved to suppress certain statements that he made over the telephone to Officer Moore, contending that there was an insufficient identification of Gray as the party with whom Moore spoke. The trial court refused to

suppress the statements, concluding that the matter was a question for the jury's consideration, and Gray assigned error to this ruling. Because a proper foundation had been laid for the admission of these statements, we find no merit to this contention.

D

Searches and Seizures.

Gray contends that the seizure of certain evidence pertaining to McClelland's murder found in his home violated his Fourth Amendment rights. He also claims that the search of his automobile was illegal.

On May 10, 1985, police officers went to Gray's residence armed with a search warrant that authorized a search of his house for marijuana, paraphernalia, and other drug-related items. During the search, the officers found and seized a quantity of marijuana, cocaine, and drug paraphernalia.

The police also seized other items, unrelated to the drug charge, that connected Gray to the McClelland murder. Among the items seized were a quantity of .32-caliber cartridges, a pistol holster, a jewelry box and jewelry bearing Murphy's Mart price tags, and "gym bags" similar to those reported missing from Murphy's Mart.

Gray does not contest the validity of the search warrant as it related to the drug charge; nor does he question the propriety of the seizure of the drug-related items. Moreover, he concedes that during the conduct of a valid search, the police are entitled to seize evidence of other

crimes or contraband without securing an additional warrant. *See Harris v. United States*, 331 U.S. 145, 155, 67 S.Ct. 1098, 1103, 91 L.Ed. 1399 (1947). Gray also concedes that given the character of the evidence specified in the warrant, the police were permitted to search the places where evidence of the murder was found. *See Holloman v. Commonwealth*, 221 Va. 947, 949, 275 S.E.2d 620, 622 (1981). Gray contends, nonetheless, that the search for drug-related evidence was a sham; he says the true purpose of the search was to look for evidence related to the McClelland murder.

The Attorney General acknowledges that the police knew that Gray was a potential suspect in the McClelland murder when they secured the search warrant and suspected that evidence pertaining to the murder might be discovered during the course of the drug search. The Attorney General contends, however, that seizure of such evidence was proper. We agree.

The validity of the warrant authorizing the search and seizure of drug-related evidence is not an issue in this appeal. Drug-related evidence was found and seized, and Gray was arrested for possessing marijuana. The search was not a sham merely because Gray was a possible suspect in the murder case and the police anticipated that during the drug search they might find evidence relating to the murder. *See Horne v. Commonwealth*, 230 Va. 512, 517, 339 S.E.2d 186, 190 (1986). The police had a right to be in Gray's residence to conduct a search for drugs, and in the course of the search, they were entitled to seize evidence of other crimes that was in plain view. *Blair v. Commonwealth*, 225 Va. 483, 490, 303 S.E.2d 881, 885-86 (1983).

After searching the residence and arresting Gray on the marijuana charge, the police asked Gray for permission to search his automobile. Gray consented to the search, and the police seized a gasoline can, a siphon hose, and three pairs of gloves from the trunk of the automobile.

Gray does not deny that he gave his consent for the search, but he claims the consent was not voluntary. He asserts that in view of all the circumstances, particularly his arrest and being in handcuffs, his consent was the product of police coercion.

The burden is on the Commonwealth to prove that a consent is voluntary. *Lowe v. Commonwealth*, 218 Va. 670, 678, 239 S.E.2d 112, 117 (1977), *cert. denied*, 435 U.S. 930, 98 S.Ct. 1502, 55 L.Ed.2d 526 (1978); *Hairston v. Commonwealth*, 216 Va. 387, 388, 219 S.E.2d 668, 669 (1975), *cert. denied*, 425 U.S. 937, 96 S.Ct. 1671, 48 L.Ed.2d 179 (1976). Whether a consent to a search was voluntary "is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227, 93 S.Ct. at 2048. The mere fact that a defendant is in custody is not enough in itself to demonstrate a coerced consent to search. *United States v. Watson*, 423 U.S. 411, 424, 96 S.Ct. 820, 828, 46 L.Ed.2d 598 (1976); *Lowe*, 218 Va. at 678, 239 S.E.2d at 117.

The trial court concluded that the consent was voluntary. Nothing in the record suggests that Gray was threatened or intimidated. When asked if they could search his car, Gray said, "Go ahead and search it." The police told Gray he could withdraw his consent at any time, and he never retracted it. Moreover, after he was arrested and

taken to the Suffolk police station, he executed a form authorizing the search of his car. From a totality of all the circumstances, we conclude that Gray's consent to search his automobile was given freely and voluntarily.

E

Identity of Informant.

In a pretrial hearing, Gray sought, *inter alia*, to discover the identity of the informant relied upon by the police for the issuance of the search warrant. The trial court, after hearing Gray's testimony and the evidence of the police officer who executed the affidavit for the warrant, denied the request. The court specifically found that "credible evidence [shows] that there was an informant [and] that the search warrant was . . . valid," and concluded that the informant's identity was privileged.

On appeal, Gray argues that "[t]he failure of the Court to allow [him] to examine the alleged informant, or even to confirm his existence, denied [him] the basic rights of the 5th Amendment's Due Process and the 6th Amendment's right to confront his accusers." The Supreme Court rejected these identical constitutional arguments in *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967).

Generally, the identity of a person furnishing the prosecution with information concerning criminal activities is privileged. *See Webb v. Commonwealth*, 137 Va. 833, 836, 120 S.E. 155, 156 (1923); Annot. 76 A.L.R.2d 262 (1961 & Supp.1986). The purpose of the privilege is to further

and protect the public's interest in effective law enforcement. *Roviaro v. United States*, 353 U.S. 53, 59, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957). Revealing an informant's identity would discourage private citizens from furnishing the police valuable information; thus, informants demand anonymity to protect themselves and their families. The police often depend upon professional informants for information about crimes. If the public becomes aware of the dual role played by an informant, the informant becomes useless to the police, and persons who might otherwise provide information are discouraged from rendering assistance. *See McCray*, 386 U.S. at 308-09, 87 S.Ct. at 1061; *Roviaro*, 353 U.S. at 59, 77 S.Ct. at 627; *Webb*, 137 Va. at 836, 120 S.E.2d at 156.

Although he concedes the existence of the privilege rule, Gray contends, nevertheless, that the circumstances of the present case warrant an exception. He looks to *Roviaro* as support for his contention. *Roviaro*, however, is inapposite.

In *Roviaro*, the informant had been an active participant in the crime. The Court stated that he "had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged." *Id.* at 55, 77 S.Ct. at 625. After reviewing the particular circumstances of Roviaro's trial, the Court noted that the informant was the only participant in the crime other than the accused and therefore his possible testimony was "highly relevant," that he might have "disclosed an entrapment[,] thrown doubt upon [Roviaro's] identity or on the identity

of the package[, or] . . . testified to [Roviaro's] possible lack of knowledge of the contents of the package. . . . " *Id.* at 63-64, 77 S.Ct. at 629. The Court concluded that "under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee." *Id.* at 65, 77 S.Ct. at 630.

The circumstances of Gray's case are altogether different. Nothing in the record suggests that the informant participated in or knew anything about the crimes for which Gray stands convicted. Unlike *Roviaro*, the informant in the present case could not have been helpful in Gray's defense of his capital murder charge. Indeed, the affidavit for the search warrant shows that the information furnished was limited to Gray's drug activities and the informant was a person who had furnished the police with reliable information of narcotic activities in the past. We conclude, therefore, that under the circumstances of the present case the privilege rule applies and the trial court did not err in its ruling.

F

Psychiatric Examinations.

In response to Gray's motion, the trial court appointed a private psychiatrist to evaluate Gray and assist in his defense. Gray contends, nonetheless, that the court erred in refusing to provide him with funds so he could choose his own psychiatrist. The contention is meritless.

Before an indigent defendant is entitled to a court-appointed independent psychiatrist to assist the defense in a capital case, there must be a threshold showing that

his sanity is likely to be a significant factor in his defense. *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 1097, 84 L.Ed.2d 53 (1985); *Tuggle v. Commonwealth*, 230 Va. 99, 104, 334 S.E.2d 838, 841 (1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 3309, 92 L.Ed.2d 722 (1986). Additionally, when the Commonwealth in a capital sentencing proceeding presents psychiatric evidence of an indigent defendant's future dangerousness, the Commonwealth must provide the defendant the assistance of a psychiatrist on the issue. *Ake*, 470 U.S. at 86-87, 105 S.Ct. at 1098-99; *Tuggle*, 230 Va. at 107-08, 334 S.E.2d at 843-44. It is clear, however, that an indigent accused does not have "a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Ake*, 470 U.S. at 83, 105 S.Ct. at 1097; *Pruett v. Commonwealth*, 232 Va. 266, 276, 351 S.E.2d 1, 7 (1986); *Beaver v. Commonwealth*, 232 VA. 521, 528, 352 S.e.2d 342, 346 (1987); *Tuggle*, 230 Va. at 107, 334 S.E.2d at 843.

In the present case, Gray made no threshold showing that his sanity would likely be a significant factor in his defense, and the Commonwealth did not present psychiatric evidence that he would be a danger to society in the future. Nevertheless, the trial court appointed a private psychiatrist to assist the defense. Thus, Gray received more than is constitutionally mandated, and clearly the trial court did not err in refusing to allow Gray to choose his own psychiatrist.

After furnishing Gray with the private psychiatrist, the trial court, on the Commonwealth's motion, and over Gray's objection, ordered that Gray be sent to Central State Hospital for a psychiatric examination to determine his mental condition at the time of the offense and

whether he might be dangerous in the future. Although Gray complains about the entry of the order, the record shows that he refused to answer all questions posed by the hospital staff. Moreover, no psychiatric evidence was produced at either the guilt phase or the penalty phase of the trial. We conclude, therefore, that Gray's contention that the trial court erred in ordering the examination is without merit.

G

Refusal of Funds for an Investigator and Statistical Reports.

Gray contends that the trial court erred in denying his request for a publicly paid investigator. The contention is without merit. *See Watkins*, 229 Va. at 478, 331 S.E.2d at 430; *Stockton*, 227 Va. at 140-41, 314 S.E.2d at 382; *Quintana v. Commonwealth*, 224 Va. 127, 135, 295 S.E.2d 643, 646 (1982), *cert. denied*, 460 U.S. 1029, 103 S.Ct. 1280, 75 L.Ed.2d 501 (1983); *Martin v. Commonwealth*, 221 Va. 436, 445-46, 271 S.E.2d 123, 129-30 (1980). A publicly paid investigator for an indigent defendant is "an act of judicial grace not constitutionally required." *Quintana*, 224 Va. at 135, 295 S.E.2d at 646. For the same reasons, we reject Gray's contention that he is entitled to public funds to secure statistical reports regarding the imposition of the death penalty upon blacks accused of murdering whites.

H

Commonwealth's Attorney's Election to Prosecute Gray Rather Than Melvin Tucker.

Both Gray and Melvin Tucker were indicted for capital murder. Afterwards, the Commonwealth's Attorney elected to try only Gray on the charge of capital murder and entered into a plea bargain agreement with Tucker whereby he would be tried on a charge of first-degree murder. Gray contends that to vest a prosecutor with such unbridled discretion renders the imposition of the death sentence upon Gray "cruel and unusual punishment" in violation of the Eighth Amendment to the Federal Constitution.

Ample evidence of motive and means supports the Commonwealth's decision to try only Gray on the capital murder charge. Less than two months prior to the murder, McClelland, manager of a Murphy's Mart store, had fired Gray's wife, Melinda, from her job at the store. The day after McClelland terminated Melinda, Gray visited McClelland at the Murphy's Mart store and discussed her termination with him for about 15 minutes. Eleven days after McClelland discharged Melinda, Gray stole a .32-caliber pistol from a friend's home. The same gun was used to murder McClelland. Gray told one witness several times that he was "going to get" McClelland for firing his wife.

In addition to Tucker's testimony that Gray was the actual perpetrator (the "trigger man") of the capital murder, two witnesses testified that Gray had told them he killed McClelland, and another witness testified that he had overheard Gray admit to someone else that he was

the killer. Gray told Melvin Tucker and two of the witnesses that he had to kill McClelland because McClelland knew him and could identify him. On the other hand, Melvin Tucker did not have any personal acquaintance with McClelland prior to the crime.

The institution of criminal charges is a matter of prosecutorial discretion. *Bradshaw v. Commonwealth*, 228 Va. 484, 492, 323 S.E.2d 567, 572 (1984). Nothing in the record suggests that the Commonwealth's Attorney acted arbitrarily or abused his prosecutorial discretion. We reject the contention that in exercising his discretion he violated the constitutional proscription against cruel and unusual punishment.

I

Place of Incarceration.

Gray was tried in the City of Suffolk. Immediately after his arrest for capital murder, Gray was moved from the Suffolk City jail to the Newport News City jail. Several weeks before the trial, Gray was transferred to the Hampton City jail. Both the Newport News and Hampton jails are located within 45 miles of Suffolk. The record shows that security problems, including Gray's own safety, dictated that he not remain in the Suffolk City jail.

Although Gray concedes that his counsel "conferred in person with [him] on a frequent basis," he contends, nonetheless, that placing him in other locations when the Suffolk jail was available denied him effective assistance of counsel and due process in violation of the Federal Constitution. We do not agree.

While Gray's incarceration in other jails was an inconvenience to his counsel, he was not denied access to counsel. Moreover, the court permitted Gray to remain at the Suffolk City jail for several hours on the evenings of the trial so his attorneys could consult with him. Nothing in the record supports his contention that his counsel was ineffective as a result of his incarceration outside of Suffolk.

J

Discovery of Witnesses' Statements.

In a discovery motion, Gray sought, *inter alia*, the opportunity to inspect and copy statements that Melvin Tucker and the three other witnesses had given to the Commonwealth prior to trial. The trial court ordered that these statements be furnished to Gray "if and when said witnesses testify in this matter and before said testimony is given." Because Gray believed he should be furnished this information a reasonable time prior to trial, he assigns error to the court's ruling.

On appeal, Gray argues that "any inconsistencies between the statements these four individuals gave to the Commonwealth and their subsequent testimony at trial would be of tremendous importance to [his] defense and more importantly, possibly exculpatory." However, Gray has not told us, and the record does not disclose, how he has been prejudiced by not receiving these statements earlier. He alleges no inconsistencies between the statements and the witnesses' testimony; nor does he explain how the statements were exculpatory.

Gray was furnished these statements before the witnesses testified, and his counsel vigorously cross-examined the witnesses. Because Gray has suffered no harm or prejudice as a result of the court's ruling, we reject his contention.[3]

II

JURY MATTERS

A

Change of Venue or Venire.

Gray claims the trial court erred in refusing to grant a change of venue or, alternatively, a change of venire. He bases his claim on alleged widespread publicity of the crime in the community, but makes no allegation that the publicity was inaccurate or intemperate. Gray presented no affidavits suggesting widespread community bias and submitted only three newspaper articles. The information in the newspaper articles was factually accurate, nonprejudical, and noninflammatory. In response to extensive questioning by the court and counsel during *voir dire*, each venireman who qualified indicated that his decision

[3] Similarly, we reject Gray's contention that the trial court erred in refusing to declare a mistrial because the Commonwealth failed to disclose the name of Carl Bond, who was incarcerated with Gray for a period of time. Bond's testimony regarding a conversation with Gray about the McClelland murder contradicted the testimony of another inmate. Because Gray himself discovered Bond's name and whereabouts and called him as a witness at trial, we conclude that Gray suffered no prejudice.

would not be affected by anything he had heard or read about the case.

The decision whether to change venue or venire is a matter within the sound discretion of the trial court, and its ruling will be reversed only upon an affirmative showing on the record that the discretion was abused. *Watkins*, 229 Va. at 481-82, 331 S.E.2d at 432; *Washington v. Commonwealth*, 228 Va. 535, 544, 323 S.E.2d 577, 584 (1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985); *LeVasseur*, 225 Va. at 577-78, 304 S.E.2d at 651; *Newcomer v. Commonwealth*, 220 Va. 64, 67, 255 S.E.2d 485, 487 (1979); *Poindexter v. Commonwealth*, 218 Va. 314, 319, 237 S.E.2d 139, 142 (1977). Nothing in the record suggests that the trial court abused its discretion in denying a change of venue or venire.

B

Composition of the Jury.

Forty-three veniremen, of whom 33 were white and 10 were black, were summoned to appear for Gray's trial. The record establishes that the venire panel was properly selected at random. *See* Code §§ 19.2-260, 8.01-343 to -363. Of the 43 veniremen, only 36 prospective jurors underwent a complete, individualized *voir dire*. Of these 36 veniremen, eight were black. Six of the black veniremen were struck for cause by the trial court because each voiced unequivocal objections to the imposition of the death penalty.[4] *See Witherspoon v. Illinois*, 391 U.S. 510, 88

[4] Gray incorrectly states that "8 out of 10 Negroes or 80%" of the veniremen were struck for cause because they objected to

S.Ct. 1770, 20 L.Ed.2d 776 *reh'g. denied*, 393 U.S. 898, 89 S.Ct. 67, 21 L.Ed.2d 186 (1968); *LeVasseur*, 225 Va. at 576, 304 S.E.2d at 650; *Coppola v. Commonwealth*, 220 Va. 243, 250, 257 S.E.2d 797, 802 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980). On Gray's motion, the court struck for cause venireman Holt, the seventh black, because Holt's father had been the victim of a recent robbery-murder.

After the court had ruled on all challenges for cause and the required number of veniremen had been qualified, only one black, Alknah Thomas, remained. The Commonwealth used its third peremptory strike to remove Thomas.

While recognizing that it is constitutionally permissible for a court to exclude a venireman who voices an absolute objection to the imposition of the death penalty, *see Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); *Witherspoon*, 391 U.S. at 518, 88 S.Ct. at 1775, Gray contends that the exclusion of such veniremen in the present case "is a violation of the rights provided to [him] under the 6th [and 14th Amendments] of the U.S. Constitution for an impartial jury" and precluded him from being tried "by a group of his peers." He contends that because of the views blacks purportedly hold

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the death penalty. The record clearly shows that only six veniremen were disqualified on this ground. It is not clear from the record that the six veniremen were black. However, because the Commonwealth does not challenge Gray's assertion that the six were black, we assume they were.

respecting imposition of the death penalty,[5] their exclusion pursuant to *Lockhart* and *Witherspoon* constitutes the use of a "discriminatory criterion." *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 1717, 90 L.Ed.2d 69 (1986) (reaffirming the general rule that jury members must be selected in accordance with a non-discriminatory criterion).[6] We find no merit to this contention.

At the outset, we note that a black defendant is not constitutionally entitled to be tried by members of his own race. *Batson*, 476 U.S. at ___, 106 S.Ct. at 1716-17; *Strauder v. West Virginia*, 100 U.S. 303, 305, 10 Otto 303, 25 L.Ed. 664 (1880); *Watkins*, 229 Va. at 491-92, 331 S.E.2d at 438. A defendant does have a constitutional right, however, to be tried by jury members selected pursuant to neutral and non-discriminatory guidelines. *See Martin v. Texas*, 200 U.S. 316, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497 (1906); *Ex parte Virginia*, 100 U.S. 339, 10 Otto 339, 25 L.Ed. 676 (1880). As Gray concedes, the Supreme Court recently held in *Lockhart* that a death-qualified jury does not violate the right of a defendant in a capital case to be tried by an impartial jury selected from a representative cross-section of the community. 476 U.S. at ___, 106 S.Ct. at 1764. *See also Pruett*, 232 Va. at 277, 351 S.E.2d at 8; *Waye*, 219 Va. at 690-91, 251 S.E.2d at 207.

The *Lockhart* Court stated that "the Constitution presupposes that a jury selected from a fair cross-section of

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[5] Gray presented no empirical data supporting his conclusion that blacks as a group oppose the death penalty.

[6] The ruling in *Batson* applies retroactively to all cases, state or federal, pending on direct review and not yet final. *Griffith v. Kentucky*, 476 U.S. ___, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." *Lockhart*, 476 U.S. at ___, 106 S.Ct. at 1770. In Gray's case, each of the prospective jurors removed for cause stated unequivocally that he or she could not impose the death penalty in any case and, therefore, could not apply the laws of the Commonwealth. The trial court had a duty to remove those veniremen. We conclude, therefore, that the Commonwealth's removal for cause of the six veniremen who voiced absolute objections to imposing the death penalty was accomplished pursuant to a non-discriminatory criterion.

Gray further contends that he was denied "the opportunity to be tried by a group of his peers" because the Commonwealth used one of its peremptory strikes to remove venireman Thomas. In Batson, the Supreme Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." 476 U.S. at ___, 106 S.Ct. at 1719. The Court then concluded that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Id.* at ___, 106 S.Ct. at 1722-23. To establish such a prima facie case the defendant:

> [F]irst must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." . . . Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Id. at ___, 106 S.Ct. at 1723 (citations omitted).

In the present case, Gray made no timely objection at trial regarding the peremptory striking of Thomas by the Commonwealth's Attorney. Thus, the Commonwealth's Attorney was not afforded an opportunity to explain his reason for the strike, and the trial court had no opportunity to decide whether the reason was constitutionally acceptable. Nevertheless, nothing in the record raises an inference that the Commonwealth's Attorney used his peremptory strike to exclude Thomas from the jury on account of his race. Indeed, it seems apparent from a reading of the following excerpt of Thomas' voir dire that it was highly unlikely he would vote for the death penalty under any circumstances.

> THE COURT: Could you in a proper case impose the death penalty?
>
> JUROR THOMAS: No.
>
> THE COURT: You could not?
>
> JUROR THOMAS: (Nods head negatively.)
>
> THE COURT: You could not in any way impose the death penalty?

JUROR THOMAS: Yea, I will if I have to.

THE COURT: That's what I said. Could you in a proper case impose the death penalty?

JUROR THOMAS: Yes, yes, yes. If I have to.

THE COURT: Now, we're still talking about a capital murder case. Could you also in a proper case impose the lesser penalty of life imprisonment?

JUROR THOMAS: Yea.

. . . .

[COMMONWEALTH]: Your Honor, I would like to just ask a couple of questions to clarify a couple of things. Mr. Thomas, you indicated that in a proper case you said that – Could you personally vote to impose the death penalty on somebody that's been convicted of capital murder?

JUROR THOMAS: Can I do that?

[COMMONWEALTH]: Could you vote to give somebody the death penalty in a proper case that's been convicted of capital murder? You, yourself? Could you vote to give a man the death penalty?

JUROR THOMAS: No.

[COMMONWEALTH]: You could not do that?

JUROR THOMAS: If I have to do it I would.

[COMMONWEALTH]: I don't mean if you have to do it. If you had your choice. There are

two sentences in this case. He can either be sentenced if convicted of capital murder to life in the penitentiary or to the death penalty.

JUROR THOMAS: I vote for the life.

[COMMONWEALTH]: You would vote for life. Would you vote automatically for a life sentence no matter what the facts?

JUROR THOMAS: No, it's got to be what he did.

[COMMONWEALTH]: Excuse me?

JUROR THOMAS: Depends on what he did.

[COMMONWEALTH]: Depends on what he did?

JUROR THOMAS: That's right.

[COMMONWEALTH]: That's what I'm trying to get straight. You said immediately you would vote for the life imprisonment. If you heard the evidence and determined guilt first and you found the person guilty of capital murder and you then had to decide between voting for the death penalty or voting for life imprisonment could you vote, if the facts justified it, to sentence a man to death or vote for the death penalty? Could you personally vote to do that?

JUROR THOMAS: Yea, I can.

[COMMONWEALTH]: You could? Okay. I have no further questions, Judge.

[DEFENSE COUNSEL]: No questions, Your Honor.

Clearly, Thomas gave an internally contradictory statement concerning his ability to vote for the death

penalty. His equivocation was a reasonable, nonracial basis for the Commonwealth's Attorney's strike. Significantly, the Commonwealth's Attorney also peremptorily struck two white jurors who, during voir dire, expressed similar uncertainty about imposing the death penalty. We will not infer purposeful discrimination by the peremptory strike of one black, when, as previously noted, the record indicates that there existed a neutral and nondiscriminatory basis for the strike.

C

Venireman Duplissey.

Gray assigns error to the trial court's refusal to exclude venireman William Duplissey for cause.[7] Duplissey is a former police officer, having served for 15 years in the County of Nansemond and the City of Suffolk. He later served as a security guard at Newport News Shipbuilding and Drydock Company. His occupation at the time of trial did not involve police or security duties. He last testified in court in 1974. On voir dire, he stated that he could render a fair and impartial verdict based on the evidence.

A person is not automatically excluded from a jury because of an association with law enforcement personnel, provided he demonstrates that he can be impartial. *Clozza v. Commonwealth*, 228 Va. 124, 129, 321 S.E.2d 273, 276 (1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985). Whether a venireman should be

[7] Gray's defense counsel subsequently removed Duplissey with a peremptory strike.

excluded from a jury is a matter within the sound discretion of the trial court. Because the trial court observes the venireman, its finding is entitled to great weight and will not be disturbed on appeal unless manifest error exists. *Watkins v. Commonwealth*, 229 Va. at 480, 331 S.E.2d at 431-32; *Calhoun v. Commonwealth*, 226 Va. 256, 258-59, 307 S.E.2d 896, 898 (1983).

Duplissey's answers on voir dire support the trial court's finding that, notwithstanding his previous employment in police work, he would be fair and impartial. Thus, we cannot say the court abused its discretion in refusing to strike Duplissey for cause.

D

Alternate Juror Murphy.

During voir dire, the trial court asked a group of veniremen that included George Murphy this question: "Are you or any members of your immediate family employed by any law enforcement agency?" Murphy made no response to the question. Subsequently, Murphy became one of the two alternate jurors.

Prior to the second day of trial, Gray's counsel learned that Murphy's son was currently a member of the Virginia State Police. Gray moved to declare a mistrial, and the trial court denied the motion. Gray assigns error to this ruling.

We reject this contention. Murphy was released from the panel before the case was submitted to the jury. Murphy was merely an alternate and, therefore, did not participate in the jury's deliberations or decision. Because

it is clear that Gray has suffered no harm, this issue is without merit.

E

Refusing to Sequester the Jury.

At the beginning of the trial, Gray moved for the sequestration of the jury, based on the anticipated length of the trial and the publicity it was receiving. The trial court denied the motion. After the jury returned its verdict finding Gray guilty of capital murder, Gray again moved for sequestration of the jury until the penalty phase of the trial commenced the following day. The court also denied this motion. Although Gray makes no specific allegation that failure to sequester the jury adversely affected the trial, he argues that "as a matter of policy, sequestration of a jury in a capital murder case, especially after a guilty verdict has been returned, should be the norm rather than the exception."

A trial court has broad discretion in deciding whether to sequester a jury. Its discretion extends to capital murder cases. Boggs, 229 Va. at 513-14, 331 S.E.2d at 417; Stockton, 227 Va. at 138, 314 S.E.2d at 380; *Justus v. Commonwealth*, 222 Va. 667, 677, 283 S.E.2d 905, 910-11 (1981), *cert. denied*, 455 U.S. 983, 102 S.Ct. 1491, 71 L.Ed.2d 693 (1982); *Turner v. Commonwealth*, 221 Va. 513, 524-25, 273 S.E.2d 36, 43 (1980), *cert. denied*, 451 U.S. 1011, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981).

In the present case, the trial court admonished the jury twice each day during the five-day trial not to discuss the case with others and to refrain from having any

contact with any news media accounts of the trial. Nothing in the record suggests that the jury disregarded the trial court's admonitions. From the record before us, we cannot say the trial court abused its discretion in refusing to sequester the jury.

III

THE GUILT TRIAL

A

Facts.

According to established principles of appellate review, we must view the evidence in the light most favorable to the Commonwealth, the prevailing party at trial. As previously indicated, Richard McClelland was the manager of Murphy's Mart store in the City of Portsmouth. He and the store's security guard worked late the evening of May 2, 1985, both having arrived at the store between 9:30 and 10:00 p.m.

On the same evening, approximately 9:30 p.m., Gray and Melvin Tucker, both "high" from "free basing" cocaine, entered the parking lot of Murphy's Mart in Gray's automobile to observe the store. They saw McClelland and the guard inside the store.

Shortly before midnight, McClelland and the security guard left the store in separate automobiles. Gray and Tucker followed them in Gray's automobile, which Gray was driving. McClelland and the guard went to a fast-food restaurant. McClelland went inside the restaurant, and the security guard went through the "drive-thru" and then left.

When McClelland left the restaurant, he drove toward Smithfield. Gray and Tucker continued to follow him. At a stop sign at the intersection of Nansemond Parkway and Bennett's Pasture Road, Gray pulled his automobile in front of McClelland's car and blocked McClelland's way. Gray, armed with a .32-caliber revolver, directed McClelland to get out of his automobile and into Gray's. Gray struck McClelland, and the two men took McClelland's wallet and threatened to harm his family if he did not cooperate. Gray then drove Tucker and McClelland back to the Murphy's Mart store.

When they arrived at Murphy's Mart, Gray forced McClelland at gunpoint into the store while Tucker waited outside in Gray's automobile. Approximately one-half hour later, Gray and McClelland emerged from the store with a shopping cart containing three gym bags filled with money. Gray, Tucker, and McClelland put the gym bags in the back seat of Gray's automobile and McClelland was told to get back into the car.

Gray then drove to a service station to obtain gasoline. He put some gas in the tank of the car and filled a gas can that was in the car's trunk.

After paying for the gas purchase, Gray drove McClelland and Tucker to the Frederick campus of Tidewater Community College. After passing the college, Gray backed the car down a small side road and ordered McClelland out of the car. Gray then took McClelland to a place approximately 15 to 20 feet behind the automobile and ordered him to lie down on the ground. McClelland obeyed Gray's command.

McClelland begged Gray not to hurt or shoot him, and Gray assured him that he would not be harmed. As McClelland lay face down on the ground, Gray fired six pistol shots in rapid succession into McClelland's head from a distance of 3 to 18 inches. Gray told Tucker as they drove away that he had had to kill McClelland because McClelland knew him.

Gray and Tucker then drove to the intersection where they had left McClelland's car. Gray told Tucker that he was going to burn McClelland's car to destroy evidence. Gray took the can of gasoline from the trunk of his car and doused the interior of McClelland's automobile with gasoline. He lit a match, threw it into McClelland's car, and closed the door. Gray and Tucker subsequently returned to Gray's apartment to count the stolen money, which amounted to between $12,000 and $13,000.

Some days later, Tucker and Gray went to the Nansemond Treatment Plant where Tucker was employed, and Gray threw the revolver into a contact tank. The police later recovered the revolver after Gray showed them its location.

The police discovered McClelland's body at the scene of the crime on the morning of May 3 just a few hours after he had been shot. An autopsy performed later that day established that McClelland had received six close-range .32-caliber gunshot wounds to the head, any one of which could have caused his death.

B

Photographs Depicting Victim's Body and Wounds.

The trial court, over Gray's objections, admitted into evidence six color photographs of the victim's body, including five of his bloody head. Three photographs depicted the victim's body as found at the scene of the crime; the remaining three photographs were taken at the autopsy. Gray contends the court erred in admitting these photographs because they "served no purpose other than to inflame the jury." We disagree.

The admission of photographs is a matter resting within the sound discretion of a trial court. *Wise v. Commonwealth*, 230 Va. 322, 330, 337 S.E.2d 715, 720 (1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1524, 89 L.Ed.2d 921 (1986); *Watkins*, 229 Va. at 482, 331 S.E.2d at 433; *Poyner v. Commonwealth*, 229 Va. 401, 417, 329 S.E.2d 815, 827, *cert. denied*, 474 U.S. ___, 106 S.Ct. 189, 88 L.Ed.2d 158, 474 U.S. ___, 106 S.Ct. 189-90, 88 L.Ed.2d 158, 474 U.S. ___, 106 S.Ct. 208, 88 L.Ed.2d 178 (1985); *Washington*, 228 Va. at 551, 323 S.E.2d at 588; *Jones v. Commonwealth*, 228 Va. 427, 450, 323 S.E.2d 554, 566-67 (1984); *Coleman v. Commonwealth*, 226 Va. 31, 48, 307 S.E.2d 864, 873 (1983), *cert. denied*, 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 145 (1984); *Bunch*, 225 Va. at 436-37, 304 S.E.2d at 278; *Peterson v. Commonwealth*, 225 Va. 289, 294, 302 S.E.2d 520, 524, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983); *Clanton v. Commonwealth*, 223 Va. 41, 51, 286 S.E.2d 172, 177 (1982); *Martin*, 221 Va. at 447, 271 S.E.2d at 130; *Stamper*, 220 Va. at 270, 257 S.E.2d at 816. Photographs of a victim are relevant if they tend to show motive, intent,

method, premeditation, malice, or the degree of atrociousness of the crime. *Stockton*, 227 Va. at 144, 314 S.E.2d at 384; *Waye*, 219 Va. at 692, 251 S.E.2d at 208; *Smith*, 219 Va. at 467, 248 S.E.2d at 143. Photographs that accurately portray a scene created by an accused in the commission of an offense are not rendered inadmissible because they are gruesome or shocking. *Washington*, 228 Va. at 551-52, 323 S.E.2d at 588.

In the present case, the photographs of the victim, though gruesome, accurately portrayed what the defendant had created and were relevant to establish intent, malice, premeditation, and atrociousness of the crime. We note, moreover, that the trial court rejected two photographs offered by the Commonwealth because they were duplicative of other photographs that were admitted. We hold that the trial court did not abuse its discretion in admitting the six photographs into evidence.

C

Admissibility of the Autopsy Report.

Gray contends that because the pathologist who performed the autopsy on the victim testified at trial, the admission of the autopsy report constituted error. He argues that the report has "no probative value and only tends to inflame the jury." We do not agree.

We have previously rejected this identical contention. *See Fitzgerald v. Commonwealth*, 223 Va. 615, 630, 292 S.E.2d 798, 806-07 (1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1235, 75 L.Ed.2d 469 (1983). Moreover, Code § 19.2-188 authorizes the admission of the report.

D

Requirement that Gray be in Leg Irons.

Gray contends that the trial court erred in requiring him to remain in leg irons during his trial. The court concluded that the restraints should be imposed because of the serious nature of the charges against him and to maintain security. The court, however, took pains to ensure that the jury remained unaware that Gray was shackled. Moreover, when Gray took the witness stand to testify during the sentencing phase, the leg irons had been removed outside the jury's view.

The conduct of a trial is left to the sound discretion of a trial court. *Watkins*, 229 Va. at 484, 331 S.E.2d at 433; *Justus*, 222 Va. at 676, 283 S.E.2d at 910. Requiring leg irons is a proper exercise of a court's discretion, and the court's decision need not be made upon a formal evidentiary hearing. *Frye v. Commonwealth*, 231 Va. 370, 381-82, 345 S.E.2d 267, 276 (1986).

In the present case, the trial court's ruling was reinforced by Gray's extensive and violent criminal history and the gravity of the offense for which he was being tried. Thus, we conclude that the trial court did not abuse its discretion in requiring that Gray remain in leg irons during the trial.

E

Sufficiency of the Evidence of Capital Murder.

Gray claims the evidence is insufficient to support his conviction of capital murder because the testimony of Melvin Tucker, the co-defendant, and the three other

prison inmates who testified that Gray admitted killing McClelland is incredible. We do not agree.

It is a jury's function to judge the credibility of the witnesses and the weight of their evidence. The jury has the opportunity to observe the witnesses' demeanor while testifying, to consider their interest in the outcome of the case, and to determine from all the circumstances of the case which witnesses are more believable. *See Johnson v. Commonwealth*, 224 Va. 525, 528, 298 S.E.2d 99, 101 (1982); *Coppola*, 220 Va. at 252, 257 S.E.2d at 803.

The trial judge, who also observed the witnesses and considered the evidence, has approved the jury's verdict. A trial court's judgment approving a jury's verdict is entitled to great weight on appeal and will not be disturbed unless it is contrary to law or plainly wrong. Code § 8.01-680; *Stockton*, 227 Va. at 145-46, 314 S.E.2d at 385.

The Commonwealth relied in large measure upon the testimony of Tucker and the other three prison inmates to establish that Gray actually perpetrated McClelland's murder. Although Gray has attacked their veracity, the jury was in the best position to assess their credibility. Moreover, from other circumstances proved, the jury reasonably could infer that Gray was the "trigger man." The murder weapon had been stolen by Gray. Gray, not Tucker, was acquainted with McClelland. Because McClelland had fired Gray's wife from her job at Murphy's Mart, Gray had a motive to kill McClelland. Indeed, he told a friend that he was "going to get" McClelland. The jury and the trial court were convinced beyond a reasonable doubt that Gray was the perpetrator of the murder.

We cannot say that the judgment is plainly wrong or that the evidence that Gray was the "trigger man" is incredible as a matter of law. Accordingly, we conclude that the Commonwealth successfully proved "beyond a reasonable doubt that motive, time, place, means and conduct concur in pointing out the accused as the perpetrator of the crime." Quintana, 224 Va. at 143, 295 S.E.2d at 651 (citation omitted).

IV

THE PENALTY TRIAL

A

The Sorrell Murders.

During the penalty phase of the trial, Melvin Tucker testified that Gray told him he had "knocked off" Lisa Sorrell. According to Tucker, Gray made the statement as he pointed to a picture of Lisa Sorrell in a newspaper while searching for news articles concerning McClelland's murder.

Over Gray's objection, the court permitted the Commonwealth to present additional evidence showing that two Sorrell murders actually had occurred. The police officer who had investigated the murders testified that he found the body of Lisa Sorrell slumped in the front passenger seat of a partially burned automobile in Chesapeake, a city that shares borders with Suffolk. In the trunk of the automobile was the body of Lisa's three-year-old child, Shanta Sorrell. The officer identified various photographs of the automobile and the victims. The photographs were admitted into evidence.

A State medical examiner who had performed autopsies on the bodies of Lisa and Shanta Sorrell testified about the causes of their deaths. He opined that Lisa was killed by six gunshot wounds to the head, apparently inflicted by a .32-caliber firearm, and that Shanta died of carbon monoxide inhalation. Gray, testifying in the penalty phase, denied any involvement in the Sorrell murders.

Gray contends on appeal that the trial court erred in admitting evidence of the Sorrell murders. He argues that the evidence was "highly inflammatory and inherently prejudicial." Gray points out that at the time of the trial he had not even been charged with the commission of these crimes. Gray says the only evidence linking him to these murders was the testimony of Melvin Tucker, the co-defendant with whom the Commonwealth had reached a plea bargain agreement.

In the penalty phase of a bifurcated capital murder trial, "it [is] desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 204, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976). Consistent with *Gregg*, Code § 19.2-264.4(B) provides that the jury may consider evidence that includes "the history and background of the defendant." Indeed, "[t]he jury has the duty to consider all the evidence relevant to sentencing, both favorable and unfavorable" before determining whether it is probable that the defendant would commit future acts of violence that would constitute a continuing, serious threat to society. Stamper, 220 Va. at 275-76, 257 S.E.2d at 819. "[E]vidence of prior unadjudicated criminal conduct . . . may be used in the penalty phase to prove the

defendant's propensity to commit criminal acts of violence in the future." Watkins, 229 Va. at 488, 331 S.E.2d at 436. *See Quintana*, 224 Va. at 147-48, 295 S.E.2d at 654. Determining the credibility of witnesses is peculiarly within the province of the jury.[8] Johnson, 224 Va. at 528, 298 S.E.2d at 101; Coppola, 220 Va. at 252, 257 S.E.2d at 803.

Gray was connected to the Sorrell murders by the testimony of Melvin Tucker. The jury heard and observed both Tucker and Gray and apparently chose to believe Tucker. We cannot say Tucker's testimony was incredible as a matter of law.

Moreover, the evidence of the police officer and the medical examiner indicated that the Sorrell murders were accomplished in a manner strikingly similar to the execution style of the McClelland murder. Lisa Sorrell also was shot six times in the head, and her automobile, like

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[8] Although he made no objection to Tucker's testimony at trial, Gray now relies on *Lee v. Illinois*, ___ U.S. ___, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), to press the argument that Tucker's testimony was "presumptively unreliable" and should not have been introduced because there were insufficient indicia of reliability to rebut the presumption. *Lee* involved the introduction of a co-defendant's out-of-court written confession incriminating the accused in a double-murder case. The co-defendant did not testify and, thus, was not subject to cross-examination. The Supreme Court held that the inability to cross-examine the co-defendant violated the accused's Sixth Amendment right to confront witnesses. *Id.* at ___, 106 S.Ct. at 2063. In the present case, however, Gray had the opportunity to cross-examine Tucker, and the jury had the opportunity to assess Tucker's credibility and reliability. We conclude, therefore, that *Lee* has no application to the facts of this case.

McClelland's, was burned after the murder. Thus, the officer's and doctor's evidence tended to corroborate Tucker's testimony of Gray's admission.

Gray's admission and the information about the particulars of the Sorrell murders were relevant evidence of Gray's propensity to commit violent acts in the future. We conclude, therefore, that the trial court did not err in admitting this evidence.

B

Criminal Record, History, and Background.

Gray, 28 years old at the time of his trial, has a criminal record dating to 1973. In August 1973, while a juvenile, he was found not innocent of petit larceny and ordered to complete one year of supervised probation. In January 1976, as an adult, Gray was convicted of burglary in Los Angeles, California. For this conviction, he served four days in jail and was placed on probation for one year.

In March 1977, Gray was convicted of disturbing the peace and resisting arrest in the City of Portsmouth, for which he was fined $10.00 and sentenced to five days in jail. The jail sentence was suspended on the condition that he be of good behavior for 12 months.

In May 1978, also in the City of Portsmouth, Gray was found guilty of malicious wounding, attempted robbery, and use of a firearm. He was sentenced to a total of 21 years in prison. In August 1983, he was released on parole. Gray was on parole at the time he committed the offenses involved in these appeals. He also has been

convicted of possession of marijuana with intent to distribute and possession of cocaine.

From November 1983 to May 1984, while on parole, Gray worked at Morrison's Cafeteria. William Palmer, general manager of the cafeteria, testified that Gray's employment was terminated because of his use of profanity. Palmer stated that Gray had a "bad attitude." Thaddeus Eley, a chef at the cafeteria, testified that Gray had told him that he "could kill" Palmer for firing him.

Ronald Whitte testified that in July 1977, while he, his wife, and two small children were bicycling, Gray and another man accosted them. Gray displayed a pistol, ordered Whitte to halt, threatened to kill Whitte, and demanded money from him. When Whitte refused to comply, Gray fired several shots from the pistol, wounding Whitte in the arm and foot.

Lawrence Tucker, who is Melvin Tucker's brother and a convicted felon, testified that, in May 1985, he had overheard Gray recount to Melvin the details of Gray's robbery of the Circle Seafood Restaurant. Gray related the incident to relieve Melvin Tucker's concerns about the Murphy's Mart robbery. Lawrence Tucker stated, "[H]e told Melvin don't worry about it, because he got away with something like that and he can get away with this."

Melvin Tucker testified that Gray told him "he had took the Circle Restaurant off" and showed Tucker the money taken in the robbery. Melvin Tucker also testified that, within a week after the Murphy's Mart robbery, he and Gray heard a rumor that a young woman had been talking about the incident. When they saw the woman on

the street, Gray told Tucker that if "she keep on running her mouth [I'm] going to fuck her up."

Sylvester Joyner and Gray were both incarcerated in the same cell block in the Suffolk City jail. Joyner testified that Gray told him that he had to leave California because "he had killed a guy out there." The jury also heard evidence pertaining to the Sorrell murders, which has been discussed in the preceding section.

Gray called seven witnesses who gave mitigating testimony. Gray, himself, also testified in the penalty phase.

Catrina Hargrove had been a neighbor of Gray for several months preceding his arrest. She had frequent contact with Gray and his wife. She described Gray as a "very nice person" and stated that she had never seen Gray exhibit any anger or hostility toward her or anybody. Hargrove had observed Gray playing with her four-year-old daughter. Hargrove said she was shocked and surprised to learn of Gray's involvement in the murder.

Keith Silver also was a friend and former neighbor of Gray. He had known Gray for approximately four years and for about one year they lived across the hall from each other. He testified that Gray treated Silver's wife and daughter as if they were "family." Silver said he did not believe that Gray was capable of murdering McClelland because such conduct was totally out of character for Gray.

Kelvin Penny, a friend and former co-worker with Gray at Morrison's Cafeteria, testified that Gray was

"great," a "good guy." He also believed that the murder was out of character with his friend.

David Wilson, a contractor for brick work and former employer of Gray, described Gray as a "[v]ery good worker." He stated that Gray got along well with everyone, never threatened anyone, and never got into fights. He also said that the murder was out of character with Gray.

Terry Carter, a probation and parole officer in the City of Portsmouth, testified that Gray had been under his supervision from August 1983 to January 1985. He stated that Gray was punctual in keeping appointments and respectful to him. He never observed any hostility in Gray.

Mavis Spitzer, who had been Gray's probation officer since January 1985, testified that Gray was "always very polite, very well-mannered, very cooperative." She also stated that on her unannounced visits she found his home "always very neat and clean, very tidy."

Rafiq Zaidi, who described himself as a Muslim minister, testified that in January 1985 Gray had been generous in contributing funds to a needy woman and her children. The minister said that the acts involved in the murder were "[t]otally inconsistent" with Gray.

Bishop Maurice Johnson, an elderly retired minister, was well acquainted with Gray. Johnson's wife is related to Gray, and Johnson performed the marriage ceremony for Gray and his wife. Bishop Johnson described Gray as an outgoing person who never exhibited hostility to him or to anyone else.

Gray testified that he was not the "trigger man." He denied any involvement in the Sorrell murders and stated that he had been acquitted of the murder charge in California. Conceding that the part he played in the McClelland murder was wrong, he reiterated that he did not pull the trigger.

C

Jury Instructions.

Gray contends that the trial court erred in refusing four jury instructions he proffered at the penalty phase of the trial. They were identified as Instructions 4A, 4B, 4C, and 4D.

Instruction 4A would have told the jury that it was not required to impose the death penalty even though it believed beyond a reasonable doubt that one or both of the aggravating factors necessary to support a death penalty had been proved. The court did instruct the jury, however, as follows:

> You have convicted the defendant, Coleman Wayne Gray, of capital murder which may be punished by death. You must decide whether the defendant shall be sentenced to death or life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:
>
> (1) That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

(2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death *or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.*

If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

(Emphasis added.)

The above-quoted instruction sufficiently and properly states the statutory framework. *LeVasseur*, 225 Va. at 594-95, 304 S.E.2d at 661. Refused Instruction 4A would have been repetitious of the language that we have emphasized in the granted instruction. "When granted instructions fully and fairly cover a principle of law, a trial court does not abuse its discretion in refusing another instruction relating to the same legal principle." *Stockton*, 227 Va. at 145, 314 S.E.2d at 384.

Instruction 4B would have told the jury that life imprisonment must be imposed if the jury had a reasonable doubt as to "any fact or conclusion which is required before the death penalty can be imposed." This instruction also is repetitious. The last two paragraphs of the

granted instruction fully cover the principle of law involved.

The trial court properly refused Instruction 4C, which listed specific mitigating factors that the jury could consider and would have told the jury that their decision upon the mitigating factors need not be unanimous. Indeed, failure to list mitigating factors inures to the benefit of a defendant. Whereas aggravating factors are limited and must be listed, "a jury is not so limited in considering mitigating factors, but may consider any and all [such] factors." *Clark v. Commonwealth*, 220 Va. 201, 212, 257 S.E.2d 784, 791 (1979), *cert. denied*, 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980). Moreover, informing the jury that its decision on mitigating factors need not be unanimous could create confusion in the jurors' minds because they are instructed that unanimity is required to impose the death penalty. *See* Code § 19.2-264.4(E).

Instruction 4D would have told the jury that it "must assume that the Defendant will be executed" if it imposed the death penalty. We assume that Gray requested this instruction to evoke the jury's sympathy. The instruction, a comment upon the obvious, was redundant, and the court properly refused it.

V

SENTENCE REVIEW

Code § 17-110.1(C) mandates that we review the death sentence. In so doing, we are required to consider and determine whether the death sentence "was imposed under the influence of passion, prejudice or any other

arbitrary factor," and whether the sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Id.*

Contending that the sentence of death was the product of passion, prejudice, or other arbitrary factors, Gray again raises the issue of the court's failure to immediately exclude alternate juror Murphy who had "close family ties to . . . law enforcement." Gray suggests that the trial court "permitted [Murphy] to communicate his opinion to the other jury members throughout the several days leading up to [Gray's] conviction."

Elsewhere in this opinion, we have considered and rejected Gray's contention respecting Murphy. We reiterate, however, that Murphy was merely an *alternate* juror. He did not participate in the deliberations and decisions of the jury. Moreover, there is absolutely nothing in the record to suggest that Murphy "communicate[d] his opinion to the other jury members."

Gray again raises the argument that the photographs of the victim were inflammatory, and we will stand on what we have previously said concerning this issue. We also have addressed Gray's final argument: that the court erred in admitting evidence of the Sorrell murders in the penalty trial. For reasons previously stated, we again reject this contention.

Gray also argues that in our review of the sentence we "should consider the cumulative effect of the errors of the trial court." Because we have found no error in the conduct of either the guilt or penalty trial, we reject Gray's cumulative-effect argument. *See Wise*, 230 Va. at

335, 337 S.E.2d at 723; *Boggs*, 229 Va. at 522, 331 S.E.2d at 422; *Waye*, 219 Va. at 704, 251 S.E.2d at 214.

By its verdict, the jury found that both the "dangerousness" and "vileness" predicates had been proved beyond a reasonable doubt. Gray contends that the evidence does not rise to the level necessary for the imposition of the death sentence based upon either predicate. We do not agree.

Respecting "dangerousness," we look first to Gray's lengthy criminal record. It is significant that in July 1977, during the period in which he was under a one-year suspended jail sentence, Gray participated in the crimes against Ronald Whitte that led to his convictions of malicious wounding, attempted robbery, and use of a firearm. More significantly, however, is Gray's participation in all of the present violent crimes against McClelland while Gray was on parole for the Whitte offenses. His record establishes that from 1976 to 1985 Gray committed 13 felonies, at least nine of which were crimes of violence. This is shocking, especially when we take into account that during this nine-year period Gray was confined in prison for more than five of those years. His record clearly demonstrates a trend towards increasingly violent crimes.

We also look to the testimony relating to Gray's history and background. From this, we learn that he told others he had committed a robbery at the Circle Seafood Restaurant in May 1985 and had locked the restaurant employees in a food freezer. He told another he murdered the Sorrells in 1984. He has threatened the lives of two persons other than McClelland.

We have considered the circumstances surrounding McClelland's murder, especially Gray's arming himself and engaging in a planned enterprise. Additionally, we have reviewed the evidence presented in mitigation. After considering all aggravating and mitigating factors, we conclude that the evidence supports the jury's finding that Gray posed a continuing, serious threat to society.

We turn next to the "vileness" predicate. From the time McClelland fired Gray's wife, Gray planned revenge. He stole the gun that he later used in McClelland's murder. He had his wife sketch the layout of Murphy's Mart. He solicited Melvin Tucker to assist him with the robbery.

On the night of the murder, Gray and Tucker waited about three hours for McClelland to come out of the store and followed him until he reached a deserted intersection. Gray ordered McClelland out of the car at gunpoint, striking him in the face with his hand.

Throughout the ordeal, Gray threatened to harm McClelland's family. Indeed, before entering Murphy's Mart, Gray told McClelland that Tucker would stay outside in the car to "take care" of McClelland's family if he were uncooperative. McClelland never resisted and was totally cooperative.

Gray originally wanted to push McClelland into a contact tank at the treatment plant. However, Tucker would not use his employee status to escort Gray through the plant's entrance gate. Consequently, Gray took McClelland to a remote area by Tidewater Community College and had him lie face down on the ground. Without any provocation whatsoever, Gray fired six bullets

into McClelland's head. In retelling the story of McClelland's murder to an inmate, Gray "laugh[ed] about the fact that he shot and killed the guy, as if it was nothing to him." Gray's laughter and total lack of remorse prompted the inmate to inform the police of Gray's confession.

From our review, we believe the evidence is sufficient to support the jury's finding of "vileness" beyond a reasonable doubt. Indeed, Gray's overall conduct in committing McClelland's murder was outrageously vile and inhuman, in that it involved depravity of mind and aggravated battery to the victim.

Pursuant to Code § 17-110.1(E), we have accumulated and considered the records of all capital murder cases reviewed by this Court to determine whether "juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes." Stamper, 220 Va. at 284, 257 S.E.2d at 824. From this review, we conclude that Gray's sentence was not excessive or disproportionate to sentences generally imposed by other sentencing bodies in Virginia for crimes similar in nature.

VI

CONCLUSION

We have considered all 41 of Gray's assignments of error and find no reversible error in any of them. Accordingly, the judgments of the trial court will be affirmed.

Record No. 860373 – Affirmed.

Record No. 860374 – Affirmed.

In the Circuit Court for the City of Suffolk, Virginia

Coleman Wayne Gray

v.

Charles E. Thompson

* * *

[32] If I might, Your Honor, respond now to Mr. Ferguson's argument.

We have here two types of claims in my petition, Your Honor, that are there as one – one sort of claim that I would lump most of these together as legal claims. Claims based on precedent in other courts. These are claims of law for which no evidence is necessary. And I would certainly submit that the Court can rule on the sufficiency and the legality of those claims, which are simply [33] matters of law to be argued before the Court here today.

Of all of those claims – and Mr. Ferguson has gone through all of them on his motion without arguing at length each one, they are all set forth in the petition for habeas corpus and the two motions to amend.

I would point out that two of them, Your Honor, that I certainly would submit are critical to the proper consideration of this habeas corpus petition, the first one is the use of the testimony of Jeramiah Smallwood. To be sure, there is precedent that even if Mr. Smallwood's testimony was perjured, that it could be used. But in this particular case the – I'd like to comment on the effect of Mr. Smallwood's testimony. The effect that can be gleened from a

reading of the record by someone who was not present at the trial of this case, and also another effect.

A reading of the record would indicate – Well, first I want to point out Mr. Smallwood's testimony was made – was given, Your Honor, in the guilt phase of the trial. Not in the sentencing phase. Mr. Smallwood testified that he had a conversation with Mr. Gray in prison following all of [34] these offenses while Mr. Gray was in pretrial incarceration. And the substance of Mr. Smallwood's testimony was that Mr. Gray admitted to him that he killed McClelland and then he laughed about it. And he in essence made light of what he had done.

There was no need for this testimony in the guilt phase of the trial to establish guilt beyond a reasonable doubt, if one were to read the record and accept the testimony of the witnesses for the Commonwealth. If one were to accept the testimony of the witnesses for the Commonwealth in the light most favorable to the Commonwealth, and that would mean accepting the credibility of those witnesses and attaching weight to their testimony, I would submit that Mr. Smallwood's testimony was not necessary in order to prove guilt beyond a reasonable doubt. That is if one accepted the weight of the evidence and accepted the credibility of the witnesses and attached weight to their testimony.

But I would suggest that that was not the purpose that Mr. Smallwood's testimony was there. The effect of Mr. Smallwood's testimony was not to establish, I would submit, that Gray murdered McClelland. Again if one accepted the credibility of the witnesses, and attached weight to their [35] testimony, and reviewed the exhibits,

it was not necessary even to consider Smallwood's testimony to establish guilt beyond a reasonable doubt.

What Smallwood's testimony did, however, Your Honor, is plant the seeds in the guilt phase for the sentencing phase. And that was to establish Gray not just as a killer – and I'm speaking from the standpoint of taking this testimony in the light most favorable to the Commonwealth. The effect of Smallwood's testimony was not to establish Gray as a mere murderer, but to establish him as a cold blooded, remorseless murderer, of the sort that again if one took the law in the light most favorable to the Commonwealth, one that deserved the death penalty. And yet this was not the sentencing phase in which Smallwood's testimony was offered.

The effect of that, I would submit, is to enflame the jury, to lead them to go beyond what they were there for at that particular phase, and it was grossly prejudicial to Gray to have this testimony introduced.

Now we get to the "what if". How do we know that Smallwood's testimony did this. I can only say, Your Honor, that in – that my understanding of the trial of this case and what went on in the courtroom, [36] what was the significance of Smallwood's testimony, did it really do this, I would submit that it may well indeed be that there can be evidence introduced that Smallwood's testimony was the single most riveting part of the trial of this case in the guilt phase. It grabbed everybody's attention. And because number one, he was a compelling witness, he was – had a certain amount of charisma, and it may well be established that at the time of his testimony and what he says was electrifying in the courtroom. And indeed if

that is the case, it would have carried over not just to determine guilt, but to inflame the jury and have their minds on capital punishment when they were simply to determine guilt or innocence.

And then compounded by the fact that Smallwood has, under oath by affidavit, recanted this testimony and stated that it was false. That establishes in itself, Your Honor, that this case could well have turned on inflammatory or perjured testimony. Not just unnecessary perjured testimony, but unnecessary perjured testimony that went to inflame the jury and carry them beyond what was their duty at that particular time.

Again it's not the fact that Smallwood's perjured himself in saying that Gray admitted being a [37] murderer. It's the manner in which Smallwood inflamed the jury through his unnecessary testimony.

And Your Honor, that seems to me that this is – that is one of the most compelling legal reasons to grant a writ of habeas corpus in this particular case. And that there can be evidence adduced at an evidentiary hearing on this petition to establish the effect in the courtroom and the effect, the likely effect on the jury, that Mr. Smallwood's perjured testimony had. And if that were indeed the case, if his perjured testimony had this effect on the jury, or even likely could have had this effect on the jury, then Mr. Gray's – then the jury's finding of guilt would certainly seem, it seems to me, to be defective.

Now the second most – again from a reading of the record in this case, the second most electrifying phase of this trial, I would suggest – and when I say electrifying, I'm not using the term lightly – one that had an impact on

those in the courtroom and most certainly had an impact on the jury, is the introduction of the testimony and the evidence concerning the Sorrell murders in Chesapeake. In essence what the Commonwealth did in order to prove that Gray was – had future dangerousness and [38] presumptive, I guess, vileness under the law, is to prove that Gray committed another murder in another jurisdiction for which he was never charged and never brought to trial.

Now in this particular case, there are – Well, there is precedent that evidence of other crimes can be used in a sentencing proceeding. And there are cases where the Supreme Court on capital cases has held that you can have direct evidence of other crimes committed by the defendant. And I've recited them in my petition. But in every one of those cases, Your Honor, I would submit that there is direct evidence that the capital murder defendant committed those other crimes. There is either eye witness testimony – I saw him do that, commit that crime – or you have statements, admissions made, that the defendant, the capital murder defendant, himself confessed to those crimes. We don't have that in this case. We simply have, in essence, the Commonwealth attempting to prove by exhibits and by a statement by another fellow, that he heard Gray say he did it, to prove a murder in another jurisdiction.

Now, the supposed confession of Gray to the Sorrell murders is in a statement testified to by co-defendant Melvin Tucker. Gray told me in essence, [39] in short, that he committed the Sorrell murders.

Well, if this was an independent witness with no ties to this particular case, whose credibility was not tarnished in this case by bias, perhaps that would have some weight. But the one person who could tie Coleman Gray in this particular case is Melvin Tucker, who had already been given a plea agreement with the Commonwealth. His capital murder charge had been reduced to first degree murder, Tucker was going to have life imprisonment, and there you have – excuse me, I'm not sure about life imprisonment. Tucker had a sentence other than death. He had every incentive to help the Commonwealth, and the nature of his testimony is that of a biased person. But Tucker's testimony is the only direct evidence in this case that could link Coleman Gray to the Sorrell murders, other than sheer coincidence. And that is the inflammatory nature.

The cases, the law in Virginia and the cases that allow introduction of other, evidence of other crimes, deal with direct evidence in terms of eye witnesses or confessions, and I would submit that a confession by Tucker simply carries it beyond the pale.

And Your Honor, that in itself, this – the [40] Sorrell case, the introduction of that evidence, from the Sorrell case in Chesapeake, was just simply – You know, to say it was unfairly prejudicial to Mr. Gray I would submit is an understatement, and I won't comment beyond that further. But those two grounds, Your Honor, I would suggest are legal claims that certainly require those – a petition for – require further evidence not only to establish the fact that they did likely have an effect on the jury. One can never determine the effect on the jury of this evidence because we could not bring the jury in to explain

their effect. But we can establish the likelihood of such an effect, and for that reason, Your Honor, I would urge that those claims not be denied.

* * *

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK

COLEMAN WAYNE GRAY,

Petitioner,

v.

CHARLES E. THOMPSON, Warden,

Respondent.

FINAL ORDER

Upon mature consideration of the pleadings and exhibits filed herein, and the arguments of counsel, and for the reasons more fully stated in the written Opinion of this Court entered of record on April 12, 1990, the Court is of the opinion that the petitioner is not entitled to the relief sought.

The Court finds that petitioner's arguments numbered I, II, V, VI, IX, XI, XIII, XVI, and XIX were decided adversely to him at trial and on direct appeal, and are thus procedurally barred under the rules of *Brooks v. Peyton*, 210 Va. 318, 171 S.E.2d 243 (1969), and *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970).

The Court further finds that petitioner's arguments numbered III, IV, VIII, X, XII, XIV, XVII, and XX could have been raised at trial and on appeal, but were not, and are thus procedurally barred from consideration in habeas corpus proceedings under the rule of *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), and *Brooks v. Peyton*, 210 Va. 318, 171 S.E.2d 243.

The Court further finds that petitioner's argument VII is not cognizable in habeas corpus proceedings, in accordance with the rules of *Virginia Department of Corrections v. Crowley*, 227 Va. 254, 316 S.E.2d 439 (1984), and *Fitzgerald v. Bass*, 6 Va. App. 38, 46, 366 S.E.2d 615, 620 (1988), and is meritless for the reasons indicated in respondent's Motion to Dismiss.

The Court further finds that petitioner's claim XV alleging ineffective assistance of counsel does not entitle him to habeas corpus relief in that subclaims (a), (b), (c), and (k) fail to allege facts sufficient to establish errors and omissions on the part of defense counsel, or to establish that petitioner has been prejudiced thereby, and in that subclaims (d), (e), (f), (g), (h), (i), (j), (l), (m), (n), and (o) are meritless, all for the reasons more fully stated in the Opinion of this Court entered April 12, 1990.

The Court further finds that petitioner's claim XVIII is meritless, for the reasons indicated in respondent's Motion to Dismiss.

WHEREFORE, the Court hereby denies the motion for a plenary hearing and dismisses the petition for a writ of habeas corpus.

Entered this 14th day of May, 1990.

/s/ James C. Godwin
James C. Godwin, Judge

We ask for this:

/s/ John H. McLees, Jr.
John H. McLees, Jr.

Seen and objection noted:

/s/ Rodham T. Delk, Jr.
Rodham T. Delk, Jr., Esquire

CIRCUIT COURT CLERK'S OFFICE
Suffolk, Virginia

A TRUE COPY TESTE:

HENRY C. MURDEN, CLERK

By: /s/ IllegibleD.C.

In the Supreme Court of Virginia

[Caption Omitted In Printing]

* * *

IV. The Trial Court Erred in Dismissing Gray's Claim VII As Not Cognizable in Habeas Corpus Proceedings and Without Merit.

This claim involved the use of perjured testimony of Jeremiah Smallwood (J.A. 850-864) by the Commonwealth. Gray does not take issue with the case law which generally holds that after-discovered perjury is not a matter for habeas corpus unless the perjured testimony was knowingly used by the prosecution. *Fitzgerald v. Bass*, 6 Va.App. 38, 46, 366 S.E.2d 615, 620 (1988); *Thompson v. Garrison*, 516 F.2d 986, 988 (4th Cir.), *cert. den.* 423 U.S. 933, 96 S.Ct. 287 (1975).

In the case at hand, however, the trial judge dismissed Gray's claim *as a matter of law*, without any opportunity on the part of Gray to substantiate his claim by evidence or have a reasonable opportunity to inquire into the issue of knowing use of perjured testimony by the prosecutor.

Gray's claim is cognizable in habeas corpus and the trial judge's dismissal of the claim as a matter of law was error.

V. The Trial Court Erred in Dismissing Gray's Claim XV, Alleging Ineffective Assistance of Counsel, Without a Plenary Hearing in Order to Afford Gray the Opportunity to Present Evidence in Support of His Claim.

A presumption exists that trial counsel performed in an effective and proper manner. *Strickland v. Washington*, 466 U.S. 668, 693-695, 104 S.Ct. 2052, 2067-2069, (1984), and the burden of establishing that the trial defendant was denied effective assistance of counsel is on the trial defendant. *Stokes v. Warden*, 226 Va. 111, 118, 306 S.E.2d 882, 885 (1983). Obviously, therefore, it follows that evidence must be presented by Gray in order to meet his burden in this case. The Trial Court, however, in denying Gray a plenary hearing on the issue, also effectively denied Gray the only means of meeting his burden and attacking the issue.

If the right to effective assistance of counsel is to mean anything, then defendants must be given full opportunities to meet the burden of proof imposed upon them, and that burden cannot be met at the outset merely by words written in the Petition for Habeas Corpus.

The Trial Court erred in denying Gray a plenary hearing.

VI. The Trial Court Erred in Dismissing Parts (a), (e), (f), (g), (h), (i), (j), (l), (m), (n) and (o) of Gray's Claim XV as Meritless as a Matter of Law.

In dismissing those claims (relating to the effectiveness of assistance of counsel) as meritless, the Trial Court simply held, in effect, that no amount of evidence in a

plenary hearing would establish the claims by the burden of proof imposed on Gray. The Trial Court simply prejudged the issues, without hearing any evidence in the form of competent expert testimony, and thereby was in error in denying Gray a plenary hearing.

VII. The Trial Court Erred in Dismissing Gray's Claim XVIII as Meritless, as a Matter of Law.

Counsel declines to elaborate on this question, except to respectfully urge this Court, when engaging in proportionality review, to also compare death sentences in cases under review with life sentences imposed on other capital defendants and with sentences imposed upon noncapital homicide defendants, in light of the facts and circumstances in each case in order to fully insure that capital punishment is meted out only after a truly full proportionability review.

VIII. The Court Should Reexamine Ruling in *Gray v. Commonwealth*, 223 Va. 313, 356 S.E.2d 157 (1987), at It Relates to Gray's Claim IX and the Sorrell Murders.

Gregg v. Georgia, 425 U.S. 153, 96 S.Ct. 2909 (1976), wherein the Supreme Court held it to be "desirable for the jury to have as much information before it as possible when it makes the sentencing decision, "428 U.S. at 204, 96 S.Ct. at 2939, did not go so far as to allow the kind of evidence such as the Sorrell murders which the Commonwealth introduced in this case.

In deciding this issue on Gray's direct appeal, *Gray v. Commonwealth, supra,* this Court relied upon *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985), *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. den.* 445 U.S. 972, 100 S.Ct. 1666 (1980), and *Quintana v. Commonwealth*, 224 Va. 127, 295 S.E.2d 643 (1982), *cert. den.* 460 U.S. 1029, 103 S.Ct. 1280 (1983), for support of the use of evidence of other crimes in the penalty phase. *Watkins*, however, is inapposite, in that Watkins was already charged and indicted for the other offenses referred to. Other cases cited in *Watkins* involved uncharged crimes which the defendant had admitted committing, or which involved *direct* evidence that the crimes were committed by the defendant. See *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815 (1985), *cert. den.* 474 U.S. 865, 106 S.Ct. 189 (1985), where Poyner himself confessed to other crimes; *Stamper, supra,* where the victim of another crime by Stamper testified; and *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371 (1984), *cert. den.* 469 U.S. 873, 105 S.Ct. 229 (1984), involving eyewitness testimony of another murder.

Only *Quintana, supra,* stands for the use of evidence of other uncharged crimes to which the defendant had not admitted and which did not involve direct evidence. In *Quintana,* witnesses testified as to admissions by the defendant of uncharged crimes in other jurisdictions. These witnesses were not, however, co-defendants of Quintana testifying under plea agreement, as was Tucker in the present case.

In this case, the only direct evidence linking Gray to the Sorrell murders was that of Melvin Tucker, a convicted felon and a co-defendant testifying under a promise of leniency – testimony which should be considered inherently unreliable. The use of this kind of evidence simply goes beyond the pale established by the existing case law, and in itself was fundamentally unfair and prejudicial to Gray.

The Commonwealth did not disclose its intention to use the Sorrell murders as evidence until such a late date that it was impossible for Gray's defense counsel to reasonably prepare for its use. Gray was literally tried and convicted in Suffolk of an uncharged and unproven offense which occurred in Chesapeake, by the use of what amounts to *no reasonable standard of proof*. The evidence was entirely circumstantial except for the testimony of Gray's co-defendant Tucker, who testified pursuant to a plea bargain. The only fair defense for Gray to such testimony would be either the requirement of proof beyond a reasonable doubt or innocence to be proved. The first was not achieved and the second would be impossible anyway, and in fact no amount of preparation time on the part of defense counsel would have been adequate. This is where another fundamental violation of Gray's right to due process occurred.

Gray is mindful of this Court's prior ruling in his own direct appeal. *Gray*, supra. A reading of the briefs in that appeal, however, shows a different treatment of the issues involved in this question than is argued here and Gray urges this Court to reexamine its prior ruling accordingly.

CONCLUSION

For the reasons shown, the Trial Court committed reversible error in entering the order dated May 14, 1990, dismissing Gray's Petition for Habeas Corpus, and Gray prays that he be awarded an appeal to this Court.

In the Supreme Court of Virginia

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 11th day of January, 1991.

Coleman Wayne Gray, Appellant,

against Record No. 901117
Circuit Court No. L88000275-L-5759

Charles E. Thompson, Warden, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellee to set aside the judgment rendered herein on November 1, 1990 and grant a rehearing thereof, it is ordered that a rehearing be granted, the said judgment refusing the petition for appeal be reversed and set aside, and the following judgment be entered in lieu thereof:

From the circuit court of the City of Suffolk

The Court has reviewed the record in this case and considered the argument submitted in support of and in opposition to the granted of an appeal.

Applying the rule in *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), to Question Presented No. 2 (Claims I, II, V, VI, IX, XI, XIII, XVI and XIX); the rule in *Slayton v. Parrigan*, 215 Va. 27, 207 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), to Question Presented No. 3 (Claims III, IV, VIII, X, XII, XIV, XVII, and XX); the rule in *Penn v. Smyth*, 188 Va. 367, 49 S.E.2d 600 (1948), to Question presented No. 5 (Claim XV, subclaims (a), (b), and (c) and

(k)), the Court refuses these claims for reasons of procedural default. *Harris v. Reed*, 489 U.S. 255 (1989).

All remaining Questions Presented are refused on the merits. Accordingly, the petition for appeal is refused.

The said circuit court shall allow court-appointed counsel the fee of $300 and also his costs and necessary direct out-of-pocket expenses.

A Copy,

Teste:

/s/ Illegible
Clerk

In the United States District Court
for the Eastern District of Virginia

[Caption Omitted In Printing]

* * *

[32] BY MR. TURNER:

Q Was this order signed by Judge Godwin, Mr. Moore?

A Appears to be, yes. That's his signature.

Q Is this what you would call a discovery order in a criminal case, is that the proper terminology?

A Yes.

Q Is this as broad an order as you are aware that you are entitled to in a criminal case in the State of Virginia?

A At the time, it was as broad as we could get, yes.

Q By the time, you are referring to 1985?

A That's correct.

Q Are you familiar with the BRADY v. MARYLAND case, sir?

A Like I said, I haven't practiced criminal law in ten years or nine years since the end of this case. So I can't give you a summary of that law at this time. I might have been able to at that time.

Q I notice there are four words crossed out on page three of this order, which is Exhibit 12. Can you tell us the history of that, if you recall, sir?

[33] A Well, that's obviously Judge Godwin who marked that out when he entered the order. And the difference in that is that normally, witnesses are sworn in in this Suffolk Circuit Court prior to their being excluded from the courtroom. And what the practical effect of this is is that we were not given any evidence as to what the witnesses were going to testify to until they took the witness stand. Otherwise, if those words were not scratched out, we would have had to have been provided with the same information on the morning of the day they were going to testify. A very significant scratching, I can assure you.

Q You say it is significant?

A Yes, it is.

Q In what sense?

A What happened here was that when the witnesses took the witness stand, literally as they were walking up and being sworn in, the Commonwealth's Attorney was handing us the statements that were going to be referred to by the witness. What Mr. Eason and I had to do, one person tried to listen to what the person was testifying to and the other attorney was reading the exculpatory evidence as it was given to us on the spot. So one attorney was [34] trying to pay attention to what was going on with the witness, the other attorney – what it basically did was rendered the order useless. It had no benefit to us at all. Might as well not even have been granted.

Q Looking back at the order, which is Exhibit 12, just one item I would like to highlight. I passed by it. It is

on page two, little D, about maybe 50 percent, 60 percent down the page. You see little D. Starts out all evidence in the Commonwealth's possession?

A Right. I've got it.

Q I think that relates back to the – actually, it relates back to the two-line order from the first page, and I'll just read it to move things along, where the order says it is ordered that the defendant, Coleman Wayne Gray, be permitted to inspect and copy the following: And then there are various items listed. I'm focusing on D on page two. Would you please read that into the record?

A Statements of prosecution witnesses.

Q Do you see language in there speaking of evidence in the Commonwealth's possession which is exculpatory to the defendant on the issue of guilt or punishment?

[35] A Right.

Q Was it your understanding that you were entitled to such evidence under this order?

A That is correct. And then the Judge basically, when Phil Ferguson would give us the statements as the person was taking the witness stand, I surmise the Judge thought he was complying with it at that time. Practically, it was not as much use to us as it would have been if we had had the statements earlier.

Q Obviously it wouldn't be of any use to you if you didn't have them at all, would it?

A Right.

Q I notice it references guilt or punishment. In speaking of punishment in the context of the McClelland case, what are we talking about, sir?

A Punishment means the penalty stage of the trial. It is a bifurcated trial. There is an evidentiary – the guilt phase, and then there is the penalty phase, which are two distinct hearings, trials.

Q From a temporal point of view, did they run consecutively at the same time?

A No, they didn't.

Q Can you just give me an overview of the days of [36] the trial, if you recall that?

A The trial started Monday morning, I believe it was December 2nd. That's the guilt trial. And that lasted well into Thursday of that week, concluded at that time with a guilty verdict of capital murder. And then the penalty trial commenced Friday morning of that week.

Q Does the same jury hear both?

A Same jury.

Q So the time between the end of the guilt phase and the beginning of the penalty phase was just one evening?

A One evening.

Q So your client has just been convicted of capital murder excuse me, yes, has just been convicted of capital murder and then you have got to prepare to deal with the sentencing phase the next morning; is that right?

A The very next morning. One evening we had. Unless one were to assume that he was going to be found guilty all along. But then again, we didn't get any of the evidence from the Commonwealth's Attorney until that evening or maybe even Friday morning. Thursday evening or Friday morning.

Q I'd like to take you back, sir, to the morning [37] of Monday, December 2nd, 1985. Do you remember where you were that day?

A Certainly. I was in Suffolk Circuit Court.

Q Who was with you that morning?

A Co-counsel, Ward Eason, and of course Mr. Gray was there.

Q Judge Godwin, I take it, was there?

A Judge Godwin, Phil Ferguson and his staff, right.

Q Did you have a meeting with the Judge prior to the trial starting?

A Certainly did. This was in chambers. The record unfortunately doesn't reveal what was in chambers and what was not. That's a very subtle difference because anything we didn't want the press or maybe the jury or anybody in the courtroom to hear, we went in chambers with the court reporter and I had an in-chambers motion. An in-chambers motion was for the Commonwealth's Attorney to advise us that morning of any evidence that it intended to adduce during the penalty trial if there was going to be one. I think we argued that on the basis of the Virginia PETERSON case which held that it was preferred

practice for the Commonwealth's Attorney to give evidence that it intended to adduce during the [38] penalty trial to the defense counsel at the beginning of trial. So I asked for it Monday morning.

Q What was the response?

A Well, I got some real stonewall from the Commonwealth's Attorney. He said he didn't want to do it and we had to press him for it. Finally, Judge Godwin ordered that he give us the evidence. And I wanted to know what the evidence was and what was told to me Monday morning, what was told to me Monday morning was that the evidence that would be adduced would be statements that Coleman Gray made to other individuals regarding other crimes he had committed. As the Court could see from my – and the record pretty much speaks for itself – I wanted to find out whether or not the Commonwealth intended to introduce any evidence whatsoever that Coleman Gray had committed the Sorrell murders. And I tried to put the Commonwealth's Attorney in the corner on that. And I think the record will show that he said, "Yes, I'm going to introduce statements that he made to other people, that he had committed those crimes. That crime and other murders." But he said statements that Coleman Gray made.

Q Did he indicate anything else, sir?

A Not at that time, he didn't, no. I found out [39] later that he was going to try the Sorrell murder case on Friday. I didn't find that out until Thursday afternoon.

MR. McLEES: I object to the witness' conclusion that he is trying the case.

THE COURT: Overruled.

BY MR. TURNER:

Q The discussion that you have just testified to took place on the early morning of December 2nd; is that correct?

A That's correct.

Q When did the trial start?

A That very morning. Voir dire commenced that morning.

Q We are talking about the McClelland murder trial?

A That's right.

Q It was a capital murder case.

A That's correct.

Q Was there any sort of publicity at that point about that case?

A Oh, it was definitely publicized. The press was there, newspapers were there, TV reporters were there. It was highly publicized and got coverage in the evening TV news every day of the entire trial, [40] I'm pretty sure. Even though I don't think I watched it real carefully.

Q In general, without getting into a lot of detail, between the morning of December 2nd, 1985 and the end of the guilt phase of the trial, what generally transpired that you recall this morning?

A Well, there were two of us without an investigator, and we were heavily engaged in the active defense of

the guilt trial, guilt phase of the trial. The evidentiary proceeding itself. When I mean by that, we would find out on a daily basis who the witnesses would be, and of course you have to react to the day's testimony. You have to anticipate the next day's testimony. And we were conducting, even during that week, we were preparing, we worked every night trying to prepare for the next day and trying to get ready for the next day of the guilt trial. We would find out that the Commonwealth was going to call certain witnesses. We would go interview them, a couple in particular, and of course we had to get together every night to prepare for the next day. I say every night, I assume I did.

Q Did you have a lot of spare time that week?

A No. You know, different people react differently to trial work. A 5-day trial is an [41] extremely physically and mentally exhausting thing for anybody and it was for me. I'm exhausted physically and mentally after one day of active trial work. So to go for 5 consecutive days was similar to running a marathon to me.

Q I take it there came a time when the guilt phase of the McClelland trial ended; is that correct?

A That guilt phase ended on Thursday. It was probably in the afternoon. Probably.

Q What date would that be, if you recall, sir?

A The 6th.

Q That's December 5th, 1985?

A That's correct.

Q When was the penalty phase to begin?

A The 6th

Q I'd like to now take you back to the morning of December 6th, 1985. Do you remember that morning, sir?

A Very well.

Q Was that a Friday?

A Yes, it was.

Q What happened that morning with respect to the Sorrell matter, if anything?

A Well, we had found out, and I don't know how we had found it out, maybe Phil Ferguson told me [42] Thursday evening, that he intended to introduce not only what he told me he was going to introduce on Monday morning when he said he was going to introduce statements made by Gray, but he was also going to input color photographs, bring the investigator and Medical Examiner down to, in essence, try the Sorrell murders.

Q How did you react to that, sir?

A It blew me completely away. And is blowing me eight-and-a-half, almost nine years later, and it still blows me away. It is unbelievable. It is incredible.

Q What did you do in response?

A I went back and read that Thursday evening, when I found out what he was going to do the next day, I read all the applicable Virginia law that I could find to try to see how I could make an argument the very next morning to show that this just simply couldn't happen

and hope that we could get upheld on appeal. That's the only thing we could do. We found the WATKINS case, a Virginia Supreme Court case, which I remember permitted this type of evidence to be adduced during the penalty stage without the necessity of a conviction. We went back and distinguished, I thought very clearly, the WATKINS [43] case and the present case. The WATKINS case, which is a Virginia Supreme Court case, did permit the Commonwealth to put in evidence of another murder or crime without a defendant being convicted, but in that particular case, the defendant was represented in the other crime, which evidence was being admitted, by the same attorneys and had been for quite some while, had been represented by those attorneys during the preliminary hearing phase, and so they were actively engaged in the representation of that defendant. And therefore, any evidence we felt – we felt any evidence that may be adduced during the penalty phase in WATKINS could be easily distinguished in our case, because Coleman Gray had not even been arrested for the thing, much less gone to a preliminary hearing, which is for a defense counsel in Suffolk the only place you can do any real investigation is the preliminary hearing when they put the evidence on. You take it from there and run. He hadn't had a preliminary hearing, hadn't been indicted, arrested, nothing. We felt we would show that to Judge Godwin, put it on the record and certainly the Supreme Court of Virginia was not going to allow this to happen. That they couldn't put the evidence of another gruesome, highly publicized [44] murder in the record, it certainly couldn't happen. Certainly it would be overturned by the Virginia Supreme Court. I argued the next morning just that, that this case

was distinguished from the WATKINS case, and on the very basis of what I just said. I might not have said it as long as I did just then, but that's what I told the Judge.

Q What position did Mr. Ferguson the prosecutor take?

A He said he could do it. He said he could put evidence of another crime even though the defendant had not been convicted of it. Because of WATKINS again, that's true. WATKINS held that the defendant did not have to be convicted of those crimes. But maybe that's bad law, maybe it has been codified. I think it has, probably, by the Virginia statutes now. But still, it is highly distinguished from our case. The man hadn't been charged. To my knowledge, he still hasn't been charged. Eight years later he hasn't been charged with it.

Q The morning of December 6th, 1985, were you prepared to defend the Sorrell murders?

A Absolutely not.

Q Did you advise the Judge of that?

A I sure did.

[45] Q What did the Judge – how did he react to this?

A He said, "Well, we have got to go by case law. And the case law is WATKINS. WATKINS says it can come in."

Q Just in general, I don't mean to get a lot of detail, what is the Sorrell murders? We have heard that term a lot.

A The Sorrell murders were much more highly publicized to my recollection than McClelland because it involved the murder of a mother and a three-year-old girl. I remember seeing on TV all I knew about the Sorrell murders is what I saw on TV. It was highly publicized for a good deal of time. It was well-known that the Sorrell mother and child were abducted or taken from Greenbriar Mall, taken somewhere in the woods and shot. The mother was shot and I'm not sure whether the newscaster said whether or not the three-year-old baby girl was shot or how she died. And then there was I remember seeing, just remember it from ten years ago, seeing Dick Brydges, a defense counsel in Virginia Beach, walking beside Timothy Sorrell, who was a prime suspect. He may have been arrested in the case. And then I remember that the newspaper people said that Timothy Sorrell was no longer a suspect and that was the end [46] of the case as far as I knew. That's the last I remember of it. But it was a highly publicized case. I cannot remember another one being as highly publicized.

Q When you refer to Timothy Sorrell not being a suspect, do you recall when you heard that?

A No.

Q Could have been after the McClelland trial?

A Could have been. I just remember he was on TV walking beside Dick Brydges. I don't remember if that was before or after the McClelland trial. I wouldn't bet money on whether it was before or after.

Q I take it the penalty phase then proceeded forward?

A It did.

Q Was there any evidence introduced concerning the Sorrell murders?

A Yes, there was. If I remember correctly, I have gone through the record recently, portions of it, Melvin Tucker, who was the co-defendant, took the stand and testified that Coleman Wayne Gray had him at some point in time that he had killed the Sorrells. And so not to worry about this. And based on that statement by Melvin Tucker, who is a [47] co-defendant, the Judge allowed this other evidence in the trial to go forth with respect to the Sorrell murders.

Q Had you seen any such statement by Mr. Tucker prior to the morning of December 6th, 1985?

A No.

Q Do you understand that there was a written statement by Mr. Tucker?

A No.

Q Okay.

A We had not been allowed to talk to Mr. Tucker.

Q Why was that?

A Because defense counsel wouldn't allow him to talk to us.

Q Did you specifically ask to?

A Sure, right at the very beginning we did. If I may, Your Honor, it is important for this Court to know that the record will show that Mr. Ferguson put in the pictures

and Detective Slezak for the purpose of showing that the crime was committed. The record will show that. That may be what Mr. Ferguson tells you tomorrow. But what happened was, the similarities between the McClelland murder and the Sorrell murder would be obvious to anyone sitting in a jury box. So what was permitted was an actual [48] trial and conviction of Coleman Gray in the Sorrell murder. Absolute conviction.

MR. McLEES: Judge, I object to this witness speculating about what the jury's conclusion or thought process was.

THE COURT: Sustained. Go ahead and ask a question.

MR. McLEES: I would move to strike that question and response.

THE COURT: No need for that. I heard it and I'll be the one to resolve it. Go ahead.

MR. TURNER: Your Honor, Exhibit 10 is in. It includes the exhibits presented on the Sorrell murders in the trial. There are a number of color photos in there that I would ask the Court to please take a look at. The exhibits are 45 through 56. They are my Exhibit 10, but in the box, there is a folder with all those exhibits and they are 45 through 56.

THE COURT: All right.

MR. TURNER: A number of them are the color photographs, I believe you will see.

BY MR. TURNER:

Q Was there any medical testimony at the penalty phase concerning the Sorrell matter?

[49] A Oh, sure. Same person. I'm sure that Dr. Pressawalla testified, showed that the bullet wounds in the head of Lisa Sorrell would be basically the same pattern as the bullet holes in the head of McClelland, shaved her head, put the color photograph of that in.

Q Who is Pressawalla?

A The Medical Examiner for the Commonwealth of Virginia, or a Medical Examiner for the Commonwealth.

Q Did he testify at the McClelland penalty phase?

A It is my recollection that he did.

Q Did he testify about the McClelland murders?

A I'm not sure if he did or someone else did. But the McClelland murder had color photographs of the bullet wounds in his head and exit in the face. Sorrell photographs had entry wounds in the head, exit in the face.

Q Dr. Pressawalla testified about the Sorrell murders; is that correct?

A Yes, he did.

Q Did a man named Michael Slezak testify in the penalty phase in the McClelland trial?

A Yes. To my recollection he was one of the chief investigators, detectives, with respect to the [50] Sorrell Murder.

Q Did you note an objection to the entire procedure dealing with the Sorrell murders on December 6th, 1985?

A Again and again, every time I had a chance.

Q When Melvin Tucker testified on December 6th, 1985, do you remember that, sir?

A Yes, I do.

Q When he walked up and sat down in that witness stand, did you have any knowledge at all that he would testify concerning the Sorrell murders?

A Not that I can recollect, no.

Q Do you recall cross-examination of any of the witnesses presented on the Sorrell murder?

A The only recollection I have of any cross-examination was reviewing the record. I don't really remember any of it.

Q Do you remember if you asked Mr. Tucker any questions?

A No. A trial lawyer doesn't ask a question of a defendant – I mean of a witness unless you had some reasonable idea what the answer is going to be.

Q Do you have any recollection of something coming up about a murder in California?

A Yes. Yes, I think that there was a witness in [51] the evidentiary trial that testified –

MR. McLEES: Excuse me, Your Honor. I object to this. The issue identified by Your Honor in the order that generated this hearing addressed the allegations concerning the Sorrell murders. This California stuff has

nothing at all to do with the Sorrell murder. This is not part of what is before the Court today.

MR. TURNER: My only purpose is that one of our exhibits is that Mr. Gray had been acquitted of murder in California. I am trying to introduce it as background to what was really going on here and to the general way of operating of the Commonwealth's Attorney in this context, which is most pertinent to the Sorrell matter, but I think it is important that the Court should know that this was happening in a little larger context, the same sort of characteristics were cropping up with other matters.

THE COURT: The objection is sustained.

BY MR. TURNER:

Q What was the result of the penalty phase of the McClelland trial?

A He was sentenced to die in the electric chair. Coleman Wayne Gray was.

Q Did there come a time when you were before Judge [52] Godwin again on the case?

A Yes. We argued it for him to set it aside. I'm pretty sure we argued the same points with respect to the Sorrell murders, the permission, the allowing of that evidence in, as inflaming the jury and as being contrary to due process and asked for him to set it aside on those bases, probably among others. Quite frankly, I have not reviewed the transcript of my argument before Judge Godwin. I don't purely recollect it from nine years ago.

Q Am I correct that in Virginia, the trial judge is the final say, so to speak, as to the sentence?

A I certainly believed in the argument before him that he had the right to set it aside at that time.

Q Did you ask him to do that?

A I believe so.

Q And the Sorrell matter was part of your request?

A Yes.

Q What was his answer?

A He said he had already ruled on it. I'm pretty sure that was being said for the record, he told me later. It was permissible evidence. He refused to set it aside.

Q Did Mr. Ferguson, the prosecutor, ever present [53] to you any materials that would suggest that Mr. Gray was not involved in the Sorrell murders?

A No.

MR. TURNER: That's all I've got, Your Honor.

THE COURT: All right. Mr. McLees?

CROSS-EXAMINATION

BY MR. McLEES:

Q Mr. Moore, you mentioned on your direct examination that you argued to Judge Godwin to set aside the verdict sentencing Mr. Gray to death. When was that, sir? Do you recall?

A It would have been 30 or 60 days subsequent to the trial. January or February of 1986.

Q Mr. Gray's actual sentencing by Judge Godwin took place in February of 1986, did it not?

A All right. Really, I'm not trying to be coy. If you say it was, the record will reflect when it happened.

Q Of course. And of course, even if you are not still involved in criminal law, you are familiar with the principle of Virginia law that a judgment doesn't become final until 21 days after it is entered?

A That's right.

Q It can be vacated or modified or set aside in [54] any way up until that point, can't it?

A Sure.

Q So any time in the approximately two months between the jury trial and the actual sentencing hearing, Judge Godwin could have vacated that sentence and given Mr. Gray a new trial.

A Well, of course.

Q Any time after sentencing and after the sentencing order was entered, within 21 days after that order was entered he could have done the same thing, couldn't he?

A Sure.

Q Now, you mentioned that the Sorrell murders were extremely, highly publicized. You said you had read about them in the paper and seen them on the TV and seen Mr. Brydges with Timothy Sorrell. Do you remember reading in the paper or hearing in the news about a

lawsuit involving the Sorrell victims' parents, Lisa Sorrell's parents, trying to prohibit Lisa Sorrell's husband from getting the proceeds of a life insurance policy?

A No.

Q You didn't read or hear about that?

A No.

Q I see. Okay. Now, between the trial, the jury [55] trial and the sentencing hearing, or within 21 days after the sentencing hearing, did you contact Lisa Sorrell's parents?

A I can't remember.

Q You have no recollection of doing so, I gather?

A No.

Q Did you contact the Chesapeake Police Department?

A I had already talked to Detective Slezak at the time the jury was – in the detective room. At that time. I knew what he thought.

Q Did you ask him why Timothy Sorrell had been a suspect?

A No. All I remember getting out of Detective Slezak was that he was angry with the prosecuting attorney in Chesapeake. He said they had screwed the case up. He was also angry with them because they wouldn't go forward with anything else in the prosecution with Coleman Gray. He had several theories.

Q Excuse me, my question was, did you ask Detective Slezak why Timothy Sorrell had been a suspect? I take it your answer to that is no?

A No.

Q Thank you. Did you demand of Mr. Ferguson to [56] produce whatever information it is that caused Timothy Sorrell to be regarded as a suspect?

A No.

Q Did you ask Judge Godwin formally or informally to order that you be given material from the Sorrell investigation that caused them to regard Timothy Sorrell as a suspect?

A No.

Q Did you investigate the Sorrell murders in any way?

A No.

Q During that period of time?

A No. I already told you we didn't have an investigator. I have already testified to that.

Q You had accepted criminal cases on a court-appointed basis before this capital murder case, surely.

A Sure.

Q Could you respond verbally for the record?

A Yes, I have. Hundreds of them.

Q Surely some of them were serious cases?

A Of course.

Q They wouldn't appoint you to this without that kind of experience, would they?

A No.

[57] Q And your experience, I take it, was that investigators are not frequently appointed to assist counsel with court-appointed cases, are they?

A I had never known of one to be appointed.

Q In fact, you usually wind up doing your own investigation, don't you?

A To the extent you do it.

Q Making telephone calls and making Court motions and contacting detectives is not unusual work for criminal defense lawyers even when they are assisted by investigators, is it?

A No. Come to think of it, we tried Detective Slezak Thursday night before Friday. I do remember that. Talked to him on the phone. Mr. Eason and I did. Mr. Eason may remember this better, but we might have talked to the Sorrell mother. I'm not sure. The mother of Lisa. I'm not sure about that. But we did some. But you have got to understand, the Court has to understand that you may object to the word, but Coleman Gray was tried and convicted of the Sorrell murders, which means he didn't get a presumption of innocence. So are you inferring to me we should then prove his innocence after he had already been convicted of guilt?

Q Mr. Moore, one of the few advantages of being in [58] my position is that I get to ask the questions. But as a

matter of fact, sir, anything that was decided at Coleman Gray's jury trial was under Virginia law subject to being set aside by Judge Godwin had you at that point demonstrated a constitutional violation, wasn't it?

A That's correct.

Q Okay. And your testimony, as I understand it, is when you made your motion for a new trial, what you argued was the same thing that you had argued at the jury trial before this evidence was put on?

A Exactly. It has nothing to do with the guilt or innocence. You asked the question. It had nothing to do with the guilt or innocence of Wayne Gray of the Sorrells. It simply had to do with permissibility of the evidence that was put on. I was not then concerned whether or not he had done it. I am not now concerned whether he did it. I am concerned as to what was allowed to happen on December 6th in Suffolk Circuit Court.

Q And you didn't make any inquiry that you can recall into whether there was evidence in the possession of any of the Commonwealth authorities, Chesapeake or Suffolk, incriminating Timothy Sorrell as opposed to Coleman Gray?

[59] A I guess I'm just not that smart.

Q Had you done so, we could have been litigating this claim in January of 1986 rather than in April of 1994, nine years later, couldn't we?

A Absolutely not.

Q Now, this evidence that Mr. Ferguson told you he would present, that Mr. Gray made statements to other

prisoners that he had committed the Sorrell murders, did that take you by surprise?

A Excuse me?

Q Did that take you by surprise, when he told you that?

A When who told me what?

Q When Mr. Ferguson told you he was going to present evidence of that sort.

A No, we were asking him for that evidence on Monday morning. We had learned that that may be a possibility.

Q When had you learned that, sir?

A The Friday night before the trial.

Q How had you learned that, sir?

A We had obtained a witness list of the Commonwealth's witnesses and gone and interviewed all of them that would talk to us.

Q And of course as you mentioned before, it was [60] Mr. Tucker's attorney who prohibited you from speaking to Mr. Tucker, not the Commonwealth's Attorney.

A Couldn't talk to Tucker, that's right. Andrew Sacks wouldn't let us do it.

Q Did you ask Mr. Gray about statements to – pertaining to the Sorrell murders?

A Yes.

Q What did he tell you?

A He said that – well, put it back in context. We interviewed the witnesses and then went to see Friday night before the trial, to see Gray. We got list on Friday showing a Keith Godwin on there, on the prosecutor's witness list. And I think I didn't have – I was in a conflict with time so I think Ward went down to see him in jail. He was in lock up in Suffolk Circuit Court. And based upon what Ward found out from him we went over to see Wayne Gray that night. Godwin wouldn't talk to us. He said he was represented by Frank Rawls, basically said that he hadn't cut a good enough deal with Ferguson yet to testify against Gray.

Q Mr. Godwin was one of the witnesses as well?

A That's correct.

Q Go ahead.

[61] A I think Wayne Gray told us that night that he had heard that Keith Godwin had told the Chesapeake Police that while in lock up in May of 1985, that Coleman Wayne Gray had told him that he had killed the Sorrells.

Q Where did Mr. Gray say he had heard that?

A I don't know. Quite frankly, I wouldn't have recollected any of that but from Mr. Eason's notes this morning.

Q There is nothing in his notes to indicate where Mr. Gray heard that?

A No.

Q What else did Mr. Gray tell you?

A That's all I can remember. As to that particular issue on Keith Godwin.

Q What about other statements attributed to Mr. Gray admitting responsibility for the Sorrell murders; what else did he say about that?

A He denied making those statements. I'm pretty sure he denied making those statements.

Q Did you ask Mr. Gray if he had in fact committed the Sorrell murders?

A I sure did.

Q What did he tell you?

A He did not. I asked him on more than one [62] occasion because it was a burning issue with me at that time.

Q He didn't tell you, I gather, that he had bragged to Mr. Tucker that he had committed the Sorrell murders?

A I'm pretty sure he denied that. I can say with certainty that he never admitted he said that to Tucker.

Q During the trial, when you were presented with the statements of the Commonwealth's witnesses as they took the stand, as you described in your direct testimony, did you ever request a recess before cross examining them so that you could review the materials that were given to you?

A No.

Q I understand that having not practiced law for ten years, you don't feel yourself fully familiar any

longer with BRADY v. MARYLAND. I gather then, would it be fair to say you are not familiar at this point with the federal practice pursuant to JENCKS v. UNITED STATES?

A No, I'm not.

Q Now, you mentioned the photographs about the Sorrell murders and the autopsy reports and the medical testimony that was introduced about the [63] Sorrell murders. You know nothing inaccurate about that information that was produced, do you? You have no reason to suggest that the photographs did not accurately depict the crime?

A No.

Q You have no reason to suggest that Dr. Pressawalla was incorrect in his testimony, medical testimony?

A No.

A No.

Q Or that the autopsy reports were incorrect.

A No.

Q Your only problem is to question whether Coleman Gray was responsible for the Sorrell murders.

A No.

Q And that was dependent on Melvin Tucker's testimony, correct?

A I wasn't in a position then nor am I now to defend Wayne Gray on the Sorrell murders.

Q And at this point, ten years later, you don't know anything inaccurate about that information, except that in your opinion, Mr. Gray is not responsible for them; is that right?

A You want my opinion as to whether or not he killed the Sorrells?

Q No, sir. I'm not asking for an opinion. I'm [64] asking for cold, hard facts within your knowledge.

A As to what?

Q As to whether any of the information that was presented at the trial with respect to the Sorrell murders was inaccurate other than what you contend was the falsehood or inaccuracy of Melvin Tucker's testimony.

A No. It was all – I have no argument with the accuracy of it whatsoever.

Q Okay.

A The only evidence that came in –

Q Excuse me, there is no question before you right now, Mr. Moore.

MR. McLEES: I have no further questions, Your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. TURNER:

Q I believe Mr. McLees asked you some questions about whether you were provided – excuse me, whether you had requested certain information prior to the penalty phase in the McClelland trial?

A That's correct.

Q I take it, sir, that you had filed the motion which we talked about earlier for discovery which was [65] referenced previously as Exhibit 11 that you looked at.

A That's correct.

Q I take it that the order which was Exhibit 12 entered by Judge Godwin concerning discovery had been entered at that point?

A That's correct.

Q Do you know if that order, if that motion would be characterized in the vernacular of lawyers as a BRADY motion, sir?

A That's correct.

Q At the time of the McClelland penalty phase hearing, did you have any concrete information as to whether Timothy Sorrell was a serious suspect at all in that, in the Sorrell matters?

A No.

Q For example, did you know at that time whether he might have been immediately exonerated or investigated vigorously or whatever?

A At some point in time, I don't know whether it was before or after, whether it came from Slezak or the TV or newspaper or through some other lawyer, I was told that he had struck a deal, that Brydges had struck a deal for him so he would be forever barred from any prosecution. That's all I ever heard.

[66] Q Did the prosecutor, Phil Ferguson, ever mention Timothy Sorrell to you, sir?

A I can't remember.

Q Looking back, sir, I realize we are looking back nine years, but looking back, were you the attorney who was assigned the task of dealing with the three witnesses who were presented on the Sorrell murders on December 6th, 1985?

A Yes. Talking about Slezak and Pressawalla and Melvin Tucker. Probably so.

Q Am I correct that if there was to be any cross-examination of those witnesses, you were the one who had been in essence assigned that task?

A That's correct.

Q Do you feel, looking back today, that you had any information that would have allowed you to do an effective cross-examination of those witnesses?

A Not any new information that was given to us, no. Remember that Melvin Tucker had been fully and extensively and well cross-examined during the guilt phase of the trial. The same jurors who were sitting there during the guilt trial were there during the penalty phase and they had been told and drawn a pretty accurate picture as to why Melvin Tucker would strike a deal and tell anybody anything they wanted [67] to hear. To save his life. That didn't need to be brought up again.

Q That examination didn't deal with the Sorrell murders, however?

A No, it had to do with his plea agreement with the Commonwealth.

Q Focusing strictly on the Sorrell murders on December 6th, my question might not have been clear, do you feel that you had any information to cross-examine Mr. Tucker or Pressawalla or Slezak on the Sorrell murders?

A No.

Q I believe you said earlier that a good trial lawyer doesn't ask a witness a question unless he knows, has a reasonable idea of the answer; is that correct?

A That's generally correct, right. Everybody messes up every now on then on that, though.

Q Would it be fair to say if it meant a person's life is at risk, taking a chance on a question like that would be a little foolhardy?

A Very foolhardy.

MR. TURNER: Thank you. That's all I have.

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In the United States District Court
for the Eastern District of Virginia

[Caption Omitted In Printing]

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DIRECT EXAMINATION

[68] BY MR. TURNER:

Q Sir, would you please state your name and address for the record?

A Carl Edward Eason, Jr., known as Ward Eason, my nickname. My office is 200 North Main Street in Suffolk, Virginia.

Q What is your occupation?

A I'm an attorney.

Q How long have you been practicing law?

[69] A Since 1979.

Q Would you please provide the Court a brief overview of your educational background?

A Went to Windsor High School in Isle of Wight County, adjacent to Suffolk, Virginia. I attended undergraduate at Hampden-Sydney College from 1972 through 1976, graduated with a B.A. in economics. Then I attended William & Mary Law School, Marshall-Wythe School of Law, from 1976 through 1979 and graduated in 1979.

Q Focusing back on the period generally around May of 1985, nine years ago, what was the general nature of your law practice at that time?

A I was then and still am with two other attorneys. It is a three-man, three-lawyer office. With staff, about seven or eight. General practice of law. As a matter of fact, up until, from 1979 through 1983, Mr. Moore, Jim Moore and I, who just left the witness stand, and I actually practiced together. In 1983 he went out on his own and opened up his own office and I remained with the two other attorneys. So it was a general practice, did criminal work, obviously civil work, bankruptcy work, which is what I do a large amount of now. But back then it was a very general practice.

[70] Q As of May of 1985, had you ever handled a capital murder case?

A No.

Q Am I correct that you were involved as co-defense counsel for Coleman Wayne Gray in the McClelland capital murder case?

A That is correct.

Q I believe Mr. Gray is here this morning. Do you see him?

A Yes, I recognize him.

Q How did you come to be involved in the McClelland murder case?

A Mr. Moore, as I mentioned to you, who was not in practice with me at that point but had been back two years previously was appointed first by the courts in Suffolk. And then I think a few days later, maybe a week or so later, it was my understanding that he asked for an additional counsel to be appointed to assist him and he

asked that I be the one that did it, that would be appointed as additional counsel and I was notified by the Court and asked if I would be willing to undertake it and I said I would.

Q In general, what was the nature of the McClelland case, just generally?

A Well, obviously it was an abduction and murder [71] and robbery, capital murder and robbery charge. If you need more than that, I'll be glad to explain. I'm just not sure exactly what your question is.

Q Was there an issue in that case, did you come to be deeply involved in analyzing the legal issues in that case?

A Yes, of course. Obviously it being a capital murder charge, and because both personally never having handled one and just within the area, within the courts of Suffolk, it being a relatively infrequent if not extraordinarily unusual type of charge that would come forward, there wasn't a whole lot of information readily available either through prior work that I had done or maybe just from other attorneys in the area who had handled those. So obviously both Mr. Moore and I were deeply involved in getting the legal issues resolved up front in front of us so we would know what to be expecting, what we had to address and how we needed to approach the case. Certainly it was intensive in the sense of much more so than any other criminal case I've ever been involved in.

Q Do you still do some criminal work?

A Some, but very little.

Q Was there an issue in the McClelland case that I [72] would call the triggerman issue?

A Certainly.

Q Could you briefly provide the Court background on that?

A Certainly the way I interpreted the laws of the Commonwealth of Virginia back in 1985, it was that in a capital murder charge, only the individual who in fact committed the murder as a principal in the first degree is the true triggerman, as we were calling it, could be the one that could potentially be given an imposition of the death penalty. That anyone else involved in a charge and ultimate conviction of capital murder, if he was not the triggerman, could not be given that death penalty. So clearly, we quickly defined it in the McClelland case where there were two – originally three defendants named. Of course Coleman Wayne Gray, Melvin Tucker, and Melinda Gray. Obviously the issue very quickly focused on that as being the prime matter, who pulled the trigger. I said two. It became clear to us that Melinda Gray was not the triggerperson. It was either Tucker or Gray that the Commonwealth was going to focus their attention on as to who in fact shot Mr. McClelland.

Q Who was Melinda Gray?

[73] A Coleman Gray's wife.

Q Was there a factual issue concerning who the triggerman was?

A Yes.

Q What was the general nature of that?

A Well, the way the facts evolved throughout the investigation and certainly through the trial, is that two individuals, Melvin Tucker and Coleman Wayne Gray, abducted Mr. McClelland on a road late one evening as he was driving home from his place of employment. And after robbing the store where Mr. McClelland was employed, then taking him to a secluded area in Suffolk and subsequently, of course, Mr. McClelland's body being found having been shot, again, there was no indication of anything other than Coleman Wayne Gray and Melvin Tucker being the two people that abducted Mr. McClelland that evening. Certainly, also the understanding of the facts as they evolved is that each Mr. Gray and Mr. Tucker were saying that the other was the gentleman who pulled the trigger.

Q Did there come a time when Mr. Melvin Tucker obtained some sort of plea bargain in the case?

A Yes.

Q Do you recall that?

[74] A Well, I recall – I don't recall exactly when. I believe certainly discussions, again from recollection and from review of my files and notes, is that that sort of thing was certainly progressing probably from early in the case up until the time of trial. I believe the actual plea agreement that Mr. Tucker had probably wasn't actually dated and therefore, I'm assuming, signed by him and the Commonwealth until sometime shortly before the trial, sometime maybe in November of 1985. But again the record will bear me out better than my memory on that. We knew the plea agreements were obviously being negotiated between Mr. Tucker and the Commonwealth.

Q Did you at some point see the plea agreement with Mr. Tucker?

A Yes, I did. Obviously.

MR. TURNER: Could I ask that the witness be shown the exhibit book?

(Documents proffered to witness.)

BY MR. TURNER:

Q I'd like to focus on Exhibit 8, please, sir. It should be a two-page document.

A Okay.

Q Have you seen that document before, sir?

[75] A I cannot sit here and tell you I have seen this document before. I haven't read every word right this second. It seems to indicate that this is an agreement that the Commonwealth entered into with Mr. Tucker through his attorney, Andy Sacks, out of Norfolk. I can just recall that we were, and I was aware that there had been a plea agreement entered into, and perhaps we were provided a copy, but I just can't tell you right now whether we were provided a copy of this letter or when we were provided it.

Q I notice that the agreement seems to have been signed on the second page on November 20th, 1985.

A Yes.

Q Does that comport with your present recollection?

A Yes, it does. That it was sometime not too far in advance of when the trial actually occurred.

Q Did you get involved at all in any sort of fact investigation into the McClelland case?

A Yes.

Q In what sense, sir?

A Beyond, obviously, discussing the matters with Mr. Gray on numerous occasions, trying to help identify who other potential witnesses would be and interviewing those witnesses either by phone or on [76] several occasions, going out to where that person may work or I specifically recall living, not where anyone worked, but certainly living, obviously that would have been most if not all the police investigators involved in the matter. I remember going out so to the scene and one of the police officers, I believe Officer Coco, actually carried us to the scene and showed how he had found the body. We went to the neighborhood where Mr. Gray lived. We went to the apartment buildings where he lived and talked to some people around in that area to see if we could find anything that would help us in the defense of Gray.

Q You are talking now about the McClelland murder; is that correct?

A That is correct.

Q Were you provided copies of any physical evidence analyses concerning the McClelland case? Do you have any recollection of that?

A I have a recollection that we were provided certain reports, autopsy reports. I believe there were no ballistic reports in this case because of the condition of the weapon, if memory serves me correctly. And while it is not, I guess, directly related to what's occurring right

now, there were [77] some drug-related charges as well Mr. Gray had arising out of his arrest at the time and I also got reports on those sorts of things. They were not tried at the same time in December, but again, they were sort of part and parcel of this whole representation I had of Mr. Gray so we were given certain reports, yes.

Q With respect to the McClelland case, there was some sort of provision of information from the Commonwealth's Attorney's Office to you; is that correct?

A Yes. And they let us review the evidence as well. I remember there being one instance when arrangements were made with Phil Ferguson, the prosecutor, Commonwealth's Attorney for the City of Suffolk, where we all met down in the evidence room of the police station and they were showing literally everything they had in the case pursuant to a Court order. I can't recall what all those items were without looking at my notes, but meeting with Phil down there, and I believe Detective Logan was present and just going through the case of any potential physical evidence.

Q This is with respect to the McClelland murder?

A That is correct.

[78] Q Would you look at Tab 12, sir, in the book you have?

A Yes.

Q There is an order there. Take a moment to look at that. You have mentioned an order in your testimony a moment ago. Would this be the order you are referring to?

A That's what I consider the discovery order in the case.

Q The discovery order?

A Yes.

Q What in general did you understand that order to encompass?

A Well, I guess maybe a couple of different areas. One, to provide us, without trying to just read from the order –

MR. McLEES: I object. The order speaks for itself and we are not hear on ineffective assistance of counsel.

THE COURT: Sustained.

MR. TURNER: I'll withdraw that, Your Honor.

BY MR. TURNER:

Q Do you recall the morning of December 2nd, 1985?

[79] A That was the morning that the trial began, a Monday morning.

Q Did an event occur that morning concerning another matter, called for want of a better term, the Sorrell murders?

A If you are speaking of in the Judge's chambers when we made some preliminary motions before we began the selection of the jury, yes.

Q Just generally, what was the nature of those motions from your perspective that morning?

A The nature of the motions?

Q Yes.

A Again, Mr. Moore, I believe, verbally made the motion, although obviously I was aware of it and we discussed it to some degree prior to when he made it. We had come to believe that at the penalty phase, if it got to that point, that the Commonwealth was going to introduce evidence, and we didn't know what, in some form or fashion attempting to connect Mr. Gray to what was known as the Sorrell murders in Chesapeake. We were obviously extremely concerned about was it going to happen, and if so, to what extent was that going to happen. So of course Mr. Moore made the motion, as the record reflects, better than I can recall, probably, to know what that [80] evidence was going to be Monday morning so that we could begin preparation for trying to rebut or defend against it if it came to that point.

Q Was Mr. Ferguson present that morning?

A Oh, yes.

Q Do you recall him indicating what if anything would be provided concerning that matter?

A As to the evidence that would be produced?

Q Yes, sir.

A I recall not being given a lot of information. And then, of course, I had read the transcript again recently of the motions made that morning. And that obviously refreshed my memory as to what Mr. Ferguson said. And it was just simply that there were going to be statements, be evidence of statements given by Gray that he had

committed the Sorrell murders. And I remember thinking, well, who did he make them to and how do we attempt to potentially rebut those, and therefore, wanting to know who was going to be saying that he made these statements and what were the specifics of those statements. And that information was not provided to us by Mr. Ferguson or by the Court on Monday morning, again, as to whom he had made these statements to.

Q Was any additional information provided Monday [81] morning concerning the Sorrell matters to you by either Mr. Ferguson or the Court?

A Not that I can recall.

Q I take it the McClelland trial ensued?

A That is correct.

Q And it went on, as we understand it, until the guilt phase part, until the end of Thursday, December 5th, 1985?

A That's right.

Q In general, what was your role in that, in the guilt phase of the trial?

A Mr. Moore and I sort of divided up. There was no real rhyme or reason as to which witness of the Commonwealth he may cross-examine, as to which one I would cross-examine. We tried to evenly divide the load concentrating on that particular witness for cross-examination purposes.

Similarly, in any potential witnesses we put on, maybe I would have prepared one witness where Mr.

Moore would have prepared another in the defense of Mr. Gray. Backing up, in the selection of the jury, it was a joint matter. We were both sort of keeping our heads together as we were going through that process and trying to best decide how to best select the jury. I think I recall that I probably took the [82] lead in the jury selection by doing the voir dire to the extent Judge Godwin let us do voir dire of the jurors ourselves rather than Mr. Moore, and I believe Mr. Moore may have made the opening statement to the jury. Then I made the closing argument to the jury, I remember, in the guilt phase.

Q Just generally, and I know you don't have any precision, if you don't know, don't worry about it. But generally, how many witnesses did the Commonwealth present in the guilt phase, just a real rough idea?

A Maybe 12. I truly cannot say that I recall very vividly at all. That's just a rough estimate.

Q Was there extensive physical evidence presented in the McClelland case?

A Yes. I would say so. In the sense of photographs, of course, and scenes of the victim and scenes of the crime itself.

Q I take it there came a time when the guilt phase was over?

A Thursday evening, I think, the jury returned the verdict.

Q The verdict was?

A Guilty. Guilty of capital murder. Among others.

[83] Q Do you have any general idea when that verdict came in on Thursday? I know it is a long time ago.

A I really don't. Again, I think my notes may reflect it if you want me to refer to them, but beyond that, I'm pretty certain it was mid to late afternoon.

Q Subsequent to that verdict being rendered, did there come a time when you had any different understanding of what was going to happen at the penalty phase than the one you had gotten from the previous Monday?

A After the penalty phase concluded Thursday afternoon, as had been the practice, basically, throughout that entire week, Mr. Moore and I met back at his office to prepare for the next day and spread out on his conference table and we started getting things together. It was that evening, I recall, that we made an attempt to contact who we understood may be a potential witness in the Sorrell issue, and that was Detective Slezak out of Chesapeake. And I believe we attempted to contact him by phone from Mr. Moore's conference room and ultimately, we were able to track him down and ask him a few questions that night. I don't vividly recall all the information that was given to us that night from Mr. Slezak, [84] other than that we knew he had been subpoenaed as a witness and was prepared to testify the next day as to the Sorrell murders.

Q Prior to that evening, the evening of December 5th, 1985, prior to that evening, had you ever heard of Detective Slezak?

A I cannot say for certainty whether it was – whether I heard about him on the fourth or the third, or the fifth, what time frame while we were trying the case. I'm certain that I had never heard of him prior to certainly the 2nd, and I think it was probably closer to the 6th when his name ultimately surfaced.

Q The evening of the 5th was literally hours before the penalty phase of the McClelland trial was to begin?

A The penalty phase started at, I think, 10 o'clock on Friday morning.

Q Did the Sorrell matter come up at the penalty phase?

A Certainly.

Q Can you relate to the Court just generally what transpired from your perspective that day?

A Well, we initially, as the record I think bears out in the transcript, we made a motion, again, Mr. [85] Moore made this motion, to exclude any evidence of the Sorrell murders into the penalty phase. That motion was, for all practical purposes, overruled by Judge Godwin. He allowed the evidence that did come in, obviously, to come in.

Q Did there come a time when you first had an impression that something more than statements was going to be dealt with in the Sorrell context?

A Yes. When I recalled it exactly, I cannot tell you. I feel it was probably sometime that Thursday that we ultimately realized that the evidence would probably be more than just an unknown individual or maybe

unknown individuals – I shouldn't say unknown totally but not knowing who the individuals would be getting on the stand saying Mr. Gray said he committed the Sorrell murders. I think it was probably Thursday we knew it would be more than just that. Without recalling specifics from nine years ago, just looking at it in general from a perspective of eight-and-a-half years ago, I believe it was when we started having conversations with the detective from Chesapeake that Thursday night from Mr. Moore's conference room, we knew it would be more than that. Therefore, Friday morning, we made a motion not to allow any evidence to come in as being inflammatory [86] and prejudicial. The evidence obviously came in. Mr. Tucker reappeared on the stand, of course, and made the statements that Mr. Gray had confessed to him or stated to him in a bragging fashion that he had killed the Sorrells, and then of course Detective Slezak and I believe Dr. Pressawalla got on the stand and presented their evidence. Detective Slezak as to his investigation of the Sorrell murders, and Dr. Pressawalla as to his conducting of the autopsy of the bodies.

Q When you were sitting in the counsel chair that morning, December 6th, and this testimony that you just recited was going on, do you have any recollection of whether you felt prepared as an attorney to deal with that testimony?

A I did not feel prepared to deal with it.

Q What kind of feeling is that?

A We had been hit on the side of the head, and literally were not ready to be able to try to defend a second murder conviction – excuse me, second murder

charge with the notice and time frame that we had been given at that particular point.

Q As I understand it, Mr. Moore actually tried to handle whatever cross-examination occurred. Do you have any recollection at all of what if any [87] cross-examination occurred or the Sorrell witnesses, the three witnesses that were presented?

A I don't believe that any cross-examination occurred of Tucker. Simply because we did not know what he was going to say. We had requested through his attorney, Andrew Sacks, to interview him. Mr. Sacks had denied us the opportunity to meet with him. And as taught in law school, if you don't know the answer to the question, you don't ask the question. Of course we didn't know what to expect from Tucker when he got on the stand and after he had made the comments he had made and after we had already, to the degree we had, attacked him on his credibility in the guilt phase, we thought it was best to leave Tucker alone and just argue to the jury that Tucker was still lying like he had lied in the guilt phase and leave it at that. With Detective Slezak, again, from reviewing the transcript recently, Mr. Moore, of course, asked him some questions and I remember Mr. Moore's angle of those questions were, well, could not this have been a copycatting type of murder in Chesapeake similar to McClelland, McClelland to Sorrell, and therefore, copycatting type of murder would imply two different people committing the murders, and I remember Mr. [88] Moore trying to bring that out potentially for him to be able to argue to the jury when he got up.

Q I take it the result of the penalty phase was a death sentence for Mr. Gray; is that right?

A That's right.

Q Do you have any recollection of being involved subsequent to that with respect to any further contact with the Court concerning the Sorrell matter, the Court being Judge Godwin?

A Well, of course after the jury returned the verdict, then a Presentence Report was prepared and it was set down for the Court to impose sentence and I think it was done in sometime, mid to late January of mid-1986. We of course filed a written motion, made an oral motion on that sentencing date to set aside the conviction and the sentencing arguing that the Sorrell evidence was improperly admitted into evidence. The motion, of course, was denied. We also were preparing during that time period, of course, trying to gather together, for lack of a better term, character witnesses and anyone else we could bring in to try to convince Judge Godwin that notwithstanding the jury's relation of sentencing, ask him to set it aside and impose a life sentence. So we obviously were focusing in on that very [89] strongly.

Q Prior to Friday, December 6th, 1985, the beginning of the penalty trial, did Phil Ferguson, the prosecutor, ever bring to your attention that there might have been other suspects or another suspect in the Sorrell case or that someone else may have said that someone else committed the Sorrell crime other than Mr. Gray?

A I do not recall that at all.

Q Do you recall Mr. Ferguson ever presenting to you any – strike that. Do you recall Mr. Ferguson ever talking with you at all about the Sorrell case, aside from the formal in-chambers proceeding that we have already gone over?

A No, I do not.

MR. TURNER: That's all I have, Your Honor.

THE COURT: All right. Mr. McLees?

CROSS-EXAMINATION

BY MR. McLEES:

Q Good morning.

A Good morning.

Q You mentioned in your direct testimony that on the Monday morning the trial started, you had come to believe that the Commonwealth would introduce [90] evidence connecting Mr. Gray to the Sorrell murder.

A Yes.

Q How did you come to that belief, sir?

A The week prior to the beginning of the trial, we had come across the name of a Keith Godwin as being a potential witness. While my notes will bear it out, I think I'm accurate in what I am getting ready to say as far as dates are concerned. On Friday, the 29th of November, we met or I met, I should say, I don't think Mr. Moore was present, based on my notes, I met with Keith Godwin, it appears probably in the Suffolk jail, to ask him what was going to be his testimony. He would not discuss it with

me and said he wanted to talk to his lawyer, who happened to be a lawyer in Suffolk named Frank Rawls. He said I want to talk to Frank Rawls before I tell you anything. So it went nowhere with that. Later on that day, Mr. Moore and I went to meet with Mr. Gray again. He was during this time period in the Hampton City Jail. For security reasons, they had put Mr. Tucker and Mr. Gray in different locations. We brought up the name of, among others, to try to get some ideas of what may happen with potential witnesses, Keith Godwin. Mr. Gray indicated to us at that point that Mr. Godwin had told Chesapeake Police that Mr. Gray had [91] told him he had killed the Sorrells. That is based on notes and recollection. Therefore, that's the first time I can recall focusing in on the fact that the Sorrells or the Sorrell issue was going to be an element in the McClelland case. I hope that answers the question.

Q So you actually knew the week before that that was going to be an issue?

A We knew that Friday.

Q I see. Now, how did Mr. Gray say he had learned that Keith Godwin had supposedly told the Chesapeake Police this information?

A I do not know. Again, I've looked in my file notes recently. It doesn't say how Mr. Gray said I know Keith Godwin said this other than that it is in my notes.

Q Do you know that you asked Mr. Gray that question?

A I cannot recall whether I asked him "How do you know Godwin said this."

Q You may have and forgotten the answer?

A May have and forgotten the answer, may have not asked it. Just don't remember.

Q The Sorrell murders were highly publicized?

A Yes.

[92] Q Likewise publicized was the fact that at one point Timothy Sorrell was a suspect?

A Obviously that is an issue now. If that was highly publicized, sitting here today, I cannot recall that being a fact. Because you have asked the question, let me respond. It was a highly – the Sorrell murder was highly publicized. A young lady and her daughter. It sort of tugs at the emotional strings. However, it was not a case that I personally followed on in the newspaper on a day-to-day basis, being something that I was picking up facts on. It was another case in another jurisdiction I had no contacts with.

Q After Mr. Gray had been sentenced to death in the proceeding where evidence was introduced to connect him to the Sorrell murders, did you go back and read the news articles about the Sorrell murder?

A I don't recall. I may have very well have. I do not recall.

Q Do you recall whether you did any investigation of the facts of the Sorrell murders after Mr. Gray's trial?

A No. I mean, I recall that we did not do any investigation of the facts, certainly to the degree of what I would call an investigation, no. Digging [93] up potential

witnesses, talking to witnesses, looking at physical evidence, going to the scene, did not do any of those things.

Q Had you asked Mr. Gray whether he committed the Sorrell murders?

A Yes.

Q What did he say?

A He denied it.

MR. McLEES: No further questions, Your Honor.

THE COURT: All right. Any redirect?

MR. TURNER: No, Your Honor.

* * *